Supreme Court, U. S.
FILED
NOV 15 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-683

THE WESTERN UNION TELEGRAPH COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, UNITED STATES OF AMERICA, AMERICAN TELEPHONE AND TELEGRAPH COMPANY, and the BELL SYSTEM OPERATING COMPANIES,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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November 15, 1976

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, The Western Union Telegraph Company ("Western Union"), requests that this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this case on July 28, 1976.

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals are reported at 541 F.2d 346 and appear at Appendix A.[1] The court, with Judge Garth dissenting, affirmed the Memorandum Opinions and Orders of the Federal Communications Commission ("FCC"), reported at 53 F.C.C.2d 1045 and 49 F.C.C.2d 321, appearing at Appendices D and E, respectively.

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[1] The appendices to this petition are cited as "Pet. App."

JURISDICTION

The judgment of the Court of Appeals was entered on July 28, 1976, and appears at Appendix B. A timely filed petition for rehearing and suggestion of rehearing *en banc* was denied on August 18, 1976, by order reproduced in Appendix C. The order denying rehearing noted that all Third Circuit judges in regular active service other than the three members of the original panel recused themselves. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

The Bell System [2] and Western Union have long exchanged facilities under a series of contracts filed with the Federal Communications Commission but not otherwise regulated under the Communications Act of 1934. In 1974, Bell challenged the applicability of the contracts to facilities employed by Western Union in supplying certain common carrier services, having previously filed tariffs seeking very substantial increases in the charges for such facilities. The Commission concluded, solely from the language of the contracts, that they did not apply to such facilities. The Court of Appeals (with Judge Garth dissenting) held that, even though the Commission relied only on "general legal precepts" in interpreting the contracts, the matter was "within the ambit of the FCC's expertise" and hence its interpretation was "entitled to greater deference from this court than would be due a district court in a breach of contract action."

The question presented is:

Whether, under the standard of judicial review established by this Court in *Chenery I* and *Texas Gas*,[3]

[2] The "Bell System" refers to American Telephone and Telegraph Company ("AT&T") and its telephone operating subsidiaries.

[3] SEC v. Chenery Corp., 318 U.S. 80 (1943); Texas Gas Transmission Corp. v. Shell Oil Co., 363 U.S. 263 (1960).

the Court of Appeals erred in totally deferring to the FCC's construction of the contracts where

(a) the contracts were filed with the Commission but are not otherwise subject to regulation under the Communications Act;

(b) the Commission relied solely on general common law canons of construction of contracts, and not on any claimed special agency competence or expertise; and

(c) only a question of law was presented as to the meaning of the contracts' language since the facts were not in dispute.[4]

STATUTES INVOLVED

Pertinent provisions of the Administrative Procedure Act and the Communications Act appear at Appendix F, *infra*.

STATEMENT OF THE CASE

This litigation arose from a dispute between Western Union and the Bell System over the scope of long-standing written contracts by which Western Union and the Bell System have agreed to lease to each other at fixed rates local and inter-city communications circuitry.

A. Background

The Bell System-Western Union exchange of facilities contracts (commonly identified as the Bell-Western Union contracts)[5] have a long history in the communications industry, dating back in one form or another to the 19th century—long before the enactment of the regulatory scheme established by the Communications Act of 1934.

[4] The question presented as to the proper standard of judicial review is also applicable to the Commission's holding that Western Union waived its contract rights by accepting a domestic satellite grant. And see note 18 *infra*, at 13.

[5] Relevant portions of sample contracts are reproduced in Appendices F & G, *infra*.

These contracts are not subject to the Act's ratemaking procedures; indeed, the Commission has disclaimed any regulatory jurisdiction over them.[6]

By the terms of these agreements, Western Union and the Bell System companies may lease from the other at fixed rates certain communications facilities for use in providing that party's authorized common carrier services to the public. The contracts have no fixed term, are revised by mutual agreement from time to time, and are terminable by either party on five years' written notice. The present form of the exchange of facilities contracts was adopted in 1928, and has been revised by mutual agreement on several occasions, the most recent of which was on January 1, 1970.

In September 1973, the Bell System invoked the five-year termination clause. However, instead of honoring these contracts for their remaining five-year term, the Bell System companies attempted to abrogate them by unilaterally filing tariffs charging substantially higher rates.

Following Western Union's protest, the Commission summarily rejected the tariffs to the extent they applied to Western Union as an unlawful attempt to abrogate existing contract rights by means of a unilateral tariff filing. The Commission construed the Communications Act as sanctioning private contractual arrangements between carriers and as conferring no authority on the FCC to sanction modification by unilateral tariff filings. *Bell System Tariff Offerings*, 46 F.C.C.2d 413 (1974). In so ruling, the Commission relied upon this Court's construction of similar provisions of the Natural Gas Act and

[6] *See Hearings on Amendments to Title II of the Communications Act of 1934 Before the House Committee on Interstate and Foreign Commerce*, 88th Cong., 2d Sess. 12-47 (1964). The contracts are filed for information purposes with the FCC pursuant to Section 211(a) of the Communications Act, 47 U.S.C. § 211(a).

Federal Power Act in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956), and *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956). On review, the Third Circuit affirmed the Commission's application of the *Mobile-Sierra* doctrine to the Communications Act, and this Court denied certiorari. *Bell Telephone Co.* v. *FCC*, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975).

The extent to which the Bell System tariffs remained applicable to Western Union thus was controlled by the scope of the contracts. If communications circuitry intended for a particular common carrier service were covered by the contracts, the lower contract rates governed; if not covered by the contracts, Western Union would be obliged to pay the higher tariff rates which would exceed the contract rates by several million dollars over the remaining contract life.

B. Proceedings Before the Federal Communications Commission

The instant litigation arose out of a contractual dispute between Western Union and the Bell System over two classes of common carrier private line communications services: (1) terrestrial private line services involving connection to telephone company switching equipment,[7] and (2) domestic satellite communications services. The issue before the Commission was whether the Bell-Western Union contracts permit the lease of circuitry for use in providing these two classes of common carrier service.

In its first Memorandum Opinion and Order (Pet. App. 64a-69a), the Commission held that Western Union

[7] Two particular private line switched services were at issue: foreign exchange ("FX") and common control switching arrangement ("CCSA") services. A description of these services appears in the court's opinion below. Pet. App. 4a n.1.

had "waived" its contracts rights when it accepted an FCC domestic satellite grant subject to a condition that Western Union operate its satellite system in accordance with all present and future Commission policies applicable to domestic satellite communications (Pet. App. 68a). Such a future policy, the Commission claimed, was adopted when it subsequently directed AT&T to tariff *its* interconnection arrangements with other domestic satellite carriers (Pet. App. 68a).[8]

In a subsequent Memorandum Opinion and Order (Pet. App. 45a-63a), the FCC refused to reconsider its earlier ruling that Western Union had "waived" its contract rights with respect to circuitry used for satellite service, and further held that the contracts' language did not require the Bell System to lease local circuits to Western Union for use in providing the switching services described above. Its conclusions were based entirely on general legal principles and ordinary canons of contract construction, involved no resolution of disputed facts, and in no way claimed to rely on any special agency expertise.

C. The Proceedings Below

Upon review, the Court of Appeals for the Third Circuit, in a 2-to-1 decision, affirmed the FCC in all respects.[9] Pet. App. 1a-41a. Over a dissent by Judge Garth, the majority construed Section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706, as compelling judicial deference to the agency's interpretation of the contracts, notwithstanding that the FCC relied only on

[8] That order did not authorize the Bell System to disregard its outstanding contractual obligations, but the Bell System tariffs filed in response disregarded the contract rates and established a sharply higher rate structure.

[9] The jurisdiction of the lower court was based upon Section 402(a) of the Communications Act, *as amended*, 47 U.S.C. § 402(a), and 28 U.S.C. §§ 2341-50.

"general legal precepts," concluding that the controversy "falls within the ambit of the FCC's expertise" (Pet. App. 11a). The majority exercised such deference even though the FCC did not itself claim or invoke any special expertise or judgment in construing the contracts. On so deferential a standard of appellate review the majority concluded that the FCC's rulings were not "arbitrary" or "capricious" (Pet. App. 17a, 20a).

The dissenting judge—who had acquired a familiarity with the underlying dispute as a result of his authorship of the earlier *Bell Telephone* decision[10]—disagreed both with the majority's resolution of the merits and its restrictive standard of review. Distinguishing cases in which agencies rely on "factors within their special knowledge or experience" (Pet. App. 24a), Judge Garth asserted that "plenary, *de novo* review" was required here because the agency relied solely on general principles of law (Pet. App. 24a, 27a, 28a, 29a), not on policy or technical grounds within the agency's special competence (Pet. App. 32a). He relied on *Texas Gas Transmission Corp.* v. *Shell Oil Co.*, 363 U.S. 263 (1960), and *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943), neither of which was cited or discussed in the majority opinion.

Judge Garth noted that Section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706(a)(2)(A), commands the reviewing court to "decide all relevant questions of law" and "set aside agency action" which is "found to be . . . not in accordance with law . . . ." Pet. App. 23a. Judge Garth concluded that the Commission had misconstrued the scope of the contractual obligations contemplated by the Bell-Western Union contracts and that Western Union had not waived any contract rights

[10] Bell Tel. Co. v. FCC, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975).

by accepting the FCC's grant of domestic satellite authority.[11]

Western Union's petition for rehearing was denied over Judge Garth's dissent, and rehearing *en banc* was automatically denied when all active Third Circuit judges other than the three members of the panel recused themselves. Pet. App. 44a.[12]

REASONS FOR GRANTING THE WRIT

Review is warranted because the Court of Appeals failed to apply to the Federal Communications Commission a basic standard of judicial review that this Court in similar circumstances held applicable to the Federal Power Commission and the Securities and Exchange Commission. The Court of Appeals ignored these precedents as well as numerous lower court decisions following this Court's standard. We believe it is important in the enforcement of the Communications Act that it be made clear that the same standard of judicial review applies to FCC orders as to FPC and SEC orders.

A. Unlike most cases decided by the FCC involving esoteric and technical issues of broadcast regulation, frequency allocation and ratemaking, the instant litigation, like cases decided every day by courts, involves a simple question of the interpretation of written instruments.

The Commission was called upon to construe the coverage of the Bell-Western Union contracts and the scope

[11] Although he joined the majority opinion, Chief Judge Seitz indicated, without stating any reasons, that "even assuming that the dissenting opinion has stated the applicable scope of review, he would still deny the petition for review." Judge Aldisert, the author of the majority opinion, did not join in that statement. Pet. App. 21a.

[12] The Fourth Circuit was similarly disabled from entertaining a suggestion of *en banc* consideration in another recent case involving the Bell System. *See* Petition for Certiorari at 14 n.21, American Tel. & Tel. Co. v. FCC, No. 76-332.

of a boilerplate license condition requiring Western Union to comply with present and future FCC policies.[13] In reviewing the Commission's actions, the Court of Appeals deferred to a non-existent agency expertise. The FCC interpreted the contracts as would any court of law of competent general jurisdiction. No special expertise was required to adjudicate these issues, and none was claimed by the FCC. The Commission, as its opinion unequivocally shows, resolved the issues of the interpretation of the contract solely, as a court would, upon the meaning of its terms in ordinary usage. Similarly, the determination of whether Western Union had waived its contract rights was based on the wording of written instruments. No factors derived from FCC "expertise" played any part whatsoever in the agency decision.

Except for the fact that a Federal Power Commission order was involved, this Court's decision in *Texas Gas Transmission Corp.* v. *Shell Oil Co.*, 363 U.S. 263 (1960), is on all fours. In that case, Mr. Justice Brennan, writing for a unanimous Court, held that no deference was to be accorded by a reviewing court to a Federal Power Commission construction of a contract for the sale of natural gas, since the agency's interpretation was based not on "the application of its expert knowledge and judgment to a highly technical field," but rather on "the application of ordinary rules of contract construction." *Id.* at 268-69. The language of the *Texas Gas* opinion fits this case like a glove. Relying on *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943), Mr. Justice Brennan stated:

> "The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based" . . . . Therefore, since the Commission professed to dispose of the case

[13] The Court of Appeals applied the deference standard to the FCC's construction of both documents. The court's error is the same in both instances.

> solely upon its review of the result called for by the application of canons of contract construction employed by the courts, and did not in any wise rely on matters within its special competence, the Court of Appeals was fully justified in making its own independent determination of the correct application of the governing principles. [*Id.* at 270; citation omitted.]

In *Chenery I*, this Court reviewed the SEC's application of general principles of equity in approving a holding company reorganization plan, and concluded that since the agency disavowed reliance on any special agency competence or expertise and professed instead to be acting as would a court of equity, no deference should be accorded the agency's judgment.[14] There is no reason for according the FCC greater deference when it purports to be making a legal judgment based on general legal principles.

The ruling below also conflicts with numerous lower court decisions. The Federal Power Commission's construction of natural gas contracts was given no special deference in a series of cases reviewed by the Seventh and Tenth Circuits. *See Pure Oil Co.* v. *FPC*, 299 F.2d 370, 373 (7th Cir. 1962); *Warren Petroleum Corp.* v. *FPC*, 282 F.2d 312, 315-16 (10th Cir. 1960). Recently, the Tenth Circuit, in *Skelly Oil Co.* v. *FPC*, 532 F.2d 177 (10th Cir. 1976), held that no deference was to be accorded the FPC's construction of a natural gas sales contract's termination clause, since the question "is a matter of ordinary contract law, a Williston-Corbin problem, and . . . nothing more than that." *Id.* at 179. Crucial to the decision was its conclusion, based on *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956), that the "Natural Gas Act does not alter the ordinary contractual relationships." 532 F.2d at 179.

[14] *See also* SEC v. Cogan, 201 F.2d 78, 85-87 (9th Cir. 1952).

The FCC, as affirmed by the court below, had previously concluded that the Communications Act does not alter ordinary inter-carrier contractual relationships. *Bell System Tariff Offerings*, 46 F.C.C. 2d 413, *aff'd*, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975).

Similarly, writing for the Second Circuit in *Pittston Stevedoring Corp.* v. *Dellaventura*, —— F.2d —— [39 AD.L.2d (P&F) 67, 80-82] (2d Cir. July 1, 1976), *petition for cert. filed sub nom. Northeast Marine Terminal Co.* v. *Caputo*, 45 U.S.L.W. 2356 (U.S. Sept. 27, 1976) (No. 76-444), Judge Friendly rejected the "'deference' approach" in reviewing an agency's construction of a statutory term in performing an umpiring, rather than policy making function. *Id.* at 81. In the present case, also, the FCC's role in contract interpretation was merely that of an umpire, since it relied exclusively on the language of the agreements in determining their scope. Pet. App. 54a.

B. Despite this array of authoritative contrary precedent, the majority below justified its limited review by asserting without analysis that "this controversy falls within the ambit of the FCC's expertise." Pet. App. 11a. The Court of Appeals thus erroneously confused "expertise" with "subject matter jurisdiction."

In *Texas Gas*, the Federal Power Commission was vested with jurisdiction to construe contracts for the sale of natural gas. But that fact did not establish FPC "expertise" to which a reviewing court must defer, where the court is no less competent to construe the contracts and is required by the APA to review "all questions of law." *See Texas Gas Transmission Corp.* v. *Shell Oil Co.*, *supra*, 363 U.S. at 270; Administrative Procedure Act § 10(e), 5 U.S.C. § 706(a)(2)(A). Similarly, approval of a holding company's reorganization plan fell within the Securities and Exchange Commission's jurisdiction. But that fact did not establish SEC "expertise" in apply-

ing general principles fashioned by courts of equity. *See Chenery I, supra*, 318 U.S. at 92-94.

The FCC is in a parallel position. It has jurisdiction to construe these contracts between communications carriers, but its jurisdiction does not qualify the Commission as more expert than the FPC or SEC—or, indeed, a reviewing court—in applying general canons of contract construction. *See* 4 DAVIS, ADMINISTRATIVE LAW TREATISE § 30.07, at 232 (1958).[15]

C. As Judge Garth recognized (Pet. App. 21a), the importance of this case transcends the interests directly involved. The "deference" accorded by the majority to the FCC's legal conclusions is, on analysis, not deference but a decision to refrain from undertaking what the majority saw as the arduous task of unravelling contract meaning[16]—a task which, though burdensome, is normally performed by courts of law. If so limited a view of judicial responsibility is permitted, administrative agencies would have broader unreviewable authority than United States district courts in deciding ordinary legal issues. The exponential growth of government programs affecting every aspect of private activity emphasizes the continued need for proper allocation of authority between agencies and reviewing courts.

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[15] As Professor Davis points out:

> The courts, not the agencies, are comparatively the experts in many areas, including constitutional law, common law, ethics, overall philosophy of law and government, judge-made law developed through statutory interpretation, most analysis of legislative history, and problems transcending the particular field of the agency. [4 DAVIS, ADMINISTRATIVE LAW TREATISE, § 30.09, at 241 (1958).]

[16] As the majority candidly stated:

> But we need not decide what result we would reach if faced with the necessity of construing de novo these Delphic contractual provisions. What is clear only is that it is not clear what these provisions, especially section 3(d), mean [Pet. App. 14a].

CONCLUSION

We believe the error below is so patent, particularly in view of the court's failure even to cite or discuss the *Chenery* and *Texas Gas* decisions, that the case may be appropriate for summary reversal. In any event, we respectfully urge review of the Court of Appeals' "abdication"[17] of a meaningful role in the "partnership" between administrative agencies and reviewing courts as "collaborative instrumentalities of justice." *United States* v. *Morgan*, 313 U.S. 409, 422 (1941). The petition for certiorari should be granted.[18]

Respectfully submitted,

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November 15, 1976

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[17] Pet. App. 21a (Garth, J., dissenting).

[18] If the Court grants certiorari and sets this case down for full briefing and oral argument, Western Union wishes to reserve the right to brief and argue the following subsidiary issues which the Court may deem appropriate for further review: (1) whether the Bell-Western Union contracts cover facilities for common carrier services involving connection to telephone company switching equipment and domestic satellite transmissions; and (2) whether, in light of *United States* v. *Seatrain Lines, Inc.*, 329 U.S. 424 (1947), and *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956), the Commission could lawfully abrogate Western Union's vested contract rights by relying on an open-ended license condition requiring licensee adherence to all existing and future agency policies.

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-1796

THE WESTERN UNION TELEGRAPH COMPANY
One Lake Street, Upper Saddle River, New Jersey 07458,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Respondents

AMERICAN TELEPHONE AND TELEGRAPH COMPANY ("AT&T") and THE BELL TELEPHONE COMPANY OF PENNSYLVANIA; THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY, THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND, THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA, THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA, CINCINNATI BELL, INC., DIAMOND STATE TELEPHONE COMPANY, ILLINOIS BELL TELEPHONE COMPANY, INDIANA BELL TELEPHONE COMPANY, MICHIGAN BELL TELEPHONE COMPANY, THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY, NEW JERSEY BELL TELEPHONE COMPANY, NEW YORK TELEPHONE COMPANY, NORTHWESTERN BELL TELEPHONE COMPANY, THE OHIO BELL TELEPHONE COMPANY, PACIFIC NORTHWEST BELL TELEPHONE COMPANY, THE PACIFIC TELEPHONE AND TELE-

GRAPH COMPANY, SOUTH CENTRAL BELL TELEPHONE COMPANY, SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY, SOUTHWESTERN BELL TELEPHONE COMPANY, AND WISCONSIN TELEPHONE COMPANY,

Intervenors

ON PETITION FOR REVIEW FROM THE FEDERAL COMMUNICATIONS COMMISSION

Argued May 6, 1976

Before: SEITZ, *Chief Judge*, and ALDISERT and GARTH, *Circuit Judges.*

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OPINION OF THE COURT

(Filed July 28, 1976)

ALDISERT, *Circuit Judge.*

This petition for review of an order of the Federal Communications Commission presents issues concerning the scope and applicability of exchange of facilities contracts in force between Western Union (WU) and American Telephone and Telegraph (AT&T). The Commission concluded that the contracts did not cover AT&T facilities to be used by WU to provide foreign exchange (FX) and common control switching arrangement (CCSA) services,[1] and that in accepting its satellite authorization WU had waived any contract rights it might have had in connection with facilities for its domestic satellite service. WU, therefore, would be obliged to lease facilities for these services at the higher rates set forth in AT&T tariffs filed with the Commission, not at the lower contract rates. We hold that the Commission acted within its statutory authority and that its conclusions were not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.[2] Accordingly, we deny WU's petition for review.

[1] Foreign exchange (FX) is a private line service that is partially "switched". It allows a businessman located in one state, to, in effect, maintain a local phone in another state. Under FX, for example, a businessman in Washington can be reached by telephone subscribers in New York City and can himself reach New York City telephone subscribers (through a local loop in Washington, a Washington-New York interexchange line, and a business line in the New York City exchange area). However, New York City telephone subscribers could not reach Washington subscribers other than the Washington businessman over FX private line service and the latter would have to maintain a separate telephone in order to tie into the Washington exchange area. A Common Control Switching Arrangement (CCSA) is a private line system for linking the various offices of a large company through large switches on a local telephone company's premises instead of through PBX switches on the customer's premises.

46 F.C.C.2d 413, 418 n.5, *aff'd sub nom. Bell Telephone Co.* v. *FCC*, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975). Reference may be had to previous decisions in this matter for definitions of other technical or peculiar terms. In the interest of simplicity, definitional material here will be minimal.

I.

A detailed history of the disputes underlying this litigation is set forth in *Bell Telephone Co.* v. *FCC*, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975), and will not be repeated here. That decision constitutes the legal predicate for the litigation at bar. There we affirmed a decision and order of the FCC which in pertinent part (a) required AT&T to furnish to all specialized common carriers—among them WU—interconnection facilities to provide authorized communications services including FX and CCSA services, and (b) rejected AT&T tariffs insofar as they covered interconnection facilities and services already covered by Bell-Western Union exchange of facilities contracts. *Bell Telephone Co.* v. *FCC* established that the Communications Act does not authorize the modification or abrogation of contracts by subsequently filed tariffs. But the order of the Com-

[2] *5 U.S.C. § 706. Scope of review*

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

. . .

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

. . .

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right . . . .

mission there affirmed also said that, with respect to facilities *not* covered by exchange of facilities contracts, AT&T was to charge pursuant to tariffs. 503 F.2d at 1282-84.

Following the decision in *Bell Telephone Co.* v. *FCC*, AT&T refused WU's requests to lease facilities for FX, CCSA, and domestic satellite services at contract rates although AT&T leased identical facilities at those rates when the facilities were used for other services. WU sought relief in administrative proceedings before the Commission. On October 16, 1974, the Commission decided that WU had waived any contract rights it might have had in connection with facilities for its domestic satellite service when it accepted its satellite authorization, but emphasized that AT&T was required to interconnect with WU to permit WU to provide FX and CCSA services. The Commission did not, at that time decide whether the required FX and CCSA interconnections were to be pursuant to tariff or contract, but asked the parties to brief the question. 49 F.C.C.2d 321 (1974). On June 24, 1975 the Commission released its Memorandum Opinion and Order rejecting WU's contention that the exchange of facilities contracts covered FX and CCSA services and denying reconsideration of its prior decision that domestic satellite contract rights, if any, had been waived. 53 F.C.C.2d 1045 (1975).

In concluding that FX and CCSA services were not covered by the exchange of facilities contracts, the Commission relied upon the language of the contracts. Conceding that facilities available under the contract are technically capable of furnishing FX and CCSA services, the Commission asked instead "whether the contracts allow the use of these facilities for FX and CCSA services." 53 F.C.C.2d at 1050. This question it resolved by

reference to contract sections 3(b)[3] and 3(d),[4] finding

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[3] (b) Connection of Leased Circuits.

Circuits leased to the Telegraph Company hereunder, or interexchange circuits of the Telegraph Company when connected to such leased circuits, may be directly connected with circuits owned by:

(1) Other telephone companies offering a general telephone service to the public within the continental United States.

(2) The United States Government on military bases, and on reservations of the National Aeronautics and Space Administration.

(3) Electric power, or oil, oil products, or natural gas pipeline companies, or railroad companies where the circuits of such companies are provided primarily to communicate with points located along a right-of-way owned or controlled by such company.

(4) Telegraph Companies offering international telegraph service under filed tariffs, where such circuits are used exclusively in international service and connection is made at terminals within the United States of such circuits.

(5) Telegraph or telephone companies, or government-operated telegraph or telephone systems, operating in companies [*sic*] bordering the continental United States, where such circuits are used exclusively in furnishing service between such countries and the continental United States, and connection is made at terminals within the United States of such circuits.

Any other direct connection of such circuits with circuits of others or of the Telephone Company shall be made only with the written approval of the Telephone Company.

53 F.C.C.2d at 1048.

[4] (d) Connection of Western Union Private Line Services With Telephone Company Services.

Connection of Western Union private line services with Telephone Company services shall be allowed only under the tariffs of the Telephone Company and consistent with the terms and conditions of such tariffs applicable to the connection of Western Union provided services with services of the Telephone Company. No such connection shall at any time be made in any

the controlling language in section 3(d): "Connection of Western Union private line services with Telephone Company services shall be allowed only under the tariffs of the Telephone Company. . . ." The contracts distinguish between services and facilities.[5] Section 3(d) applies expressly to services. In the Commission's view, however, section 3(d) served a definitional purpose, referencing the contracts themselves to services allowed at the date of contracting and thereby, limiting contract facilities to use for such services:

> The purpose of this provision is to define those situations in which Western Union services utilizing facilities obtained under the contracts, may be connected to Bell services. Since this provision references the applicable telephone company tariffs, the question before us is whether the cross reference to the applicable tariffs is to be made as of the time of contracting (e.g., January 1, 1970) or as of the date

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jurisdiction except as duly authorized by tariffs in force and effect.

53 F.C.C.2d at 1047. The Commission was aware that section 3(d) appears only in Contract No. 1, applicable to leasing within exchange areas, and not in Contract No. 2, applicable to leasing between exchange areas. WU mentions this variance by way of disparaging reliance on section 3(d), but makes no argument that the contracts ought to be separately construed as regards FX, CCSA, or domestic satellite services. (Petitioner's Brief at 20.)

[5] According to WU the "facilities" available under the contracts are "wire pair and microwave circuits, certain items of telephone equipment, and duct and pole line attachment space." (Petitioner's Brief at 16.) Again according to WU, "Telephone Company services" referred to in the contracts are "exchange switching (in the case of FX) and CCSA switching (in the case of CCSA)." (Petitioner's Brief at 21.) In addition, a "private line service", like FX, "provides the large-scale telephone customer with full-time private circuits for the transmission of communications between locations specified by the customer. The service operates to give the customer continuous communication without requiring the carrier to establish a new connection for each call or message." *Bell Telephone Co.* v. *FCC, supra,* 503 F.2d at 1254 n.3.

> the interconnection of services is to be made. The law is well settled that all parts or sections of a contract must be given effect, force and meaning, if possible, and if it can fairly and reasonably be done; and that a construction rendering a provision or term meaningless or superfluous should be avoided. If there were no Section 3(d) in the contract, then the terms and conditions governing the connection of Bell Services with the services of other common carriers would be found in the then effective applicable Bell System customer tariffs. If the cross reference to the applicable telephone company tariffs is meant to be to the then effective tariff provisions, then Section 3(d) would be superfluous. Therefore, in order to give meaning to Section 3(d), we conclude that the cross reference to applicable telephone company tariffs is to be made as of the time of contracting (e.g., January 1, 1970). Since the telephone company tariffs, at that time, did not allow Western Union to interconnect its private line services with Bell's service for the purpose of providing its own FX and CCSA services, we conclude that Western Union may not obtain under the contracts, facilities which would be used in the provision of FX and CCSA services. Western Union may, of course, obtain such facilities pursuant to Bell tariffs on file with this Commission, in the same manner and at the same rates as other common carriers offering FX and CCSA type services.

53 F.C.C.2d at 1051 (footnotes omitted).

The FCC authorized WU's domestic satellite application on January 18, 1973, subject to the condition that WU's "facilities shall be operated in accordance with all Commission policies adopted in Docket No. 16495 [which established basic domestic satellite policy objectives] and all rules and policies subsequently made applicable to domestic satellite communications. . . ." 38 F.C.C.2d 1197, 1199 (1973). Some eight months later, in the con-

text of AT&T's domestic satellite application, the Commission decided that tariffs, not private contracts, were the means most conducive to achieving its basic policy objectives of reasonable and non-discriminatory satellite licensee access to AT&T facilities.[6] The effect of the quoted conditional language, the Commission here concluded, was to waive any contract rights WU might have had in connection with its satellite operations, and to subject those operations to the subsequently articulated tariff policy. "We conclude that Western Union willingly and knowingly accepted a condition in its domestic satellite authorization, as implemented by the unchallenged AT&T decision, which constituted a voluntary waiver of its contract rights, if any existed." 53 F.C.C.2d at 1054.

WU petitions for review under § 402(a) of the Communications Act, as amended, 47 U.S.C. § 402(a), and 28 U.S.C. § 2342(1).

We turn now to review of the Commission's conclusions: first, concerning FX and CCSA services, and, second, concerning domestic satellite service.

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[6] We see no reason why tariffs should not be filed by the Bell System to cover facilities supplied to satellite licensees. The statutory requirement under our Act for filing of tariffs is based upon the national public interest in securing uniformity of treatment to all, to suppress unjust discrimination and undue preferences, and to prevent special and secret agreements, in respect to interstate wire and radio communications, and to that end to require that rates applicable thereto be established in a manner calculated to give them publicity, to make them inflexible while in force, and to cause them to be unalterable except in a manner prescribed by statute.

21. Accordingly, we shall impose as a condition to the grant herein of the AT&T applications that all charges, classifications, regulations and practices applicable to the provision by the Bell System companies of interconnection facilities shall be set forth in tariff schedules to be filed pursuant to Section 203 of the Act and Part 61 of our Rules.

42 F.C.C.2d 654, 659-60 (1973).

II.

Preliminarily, we must address a question raised concerning the proper scope of our review of the FCC's conclusions concerning FX and CCSA services. Both parties, correctly, agree that the pertinent statute is § 706 of the Administrative Procedure Act, note 2 *supra*, which provides that a reviewing court shall set aside agency conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. WU argues, however, that the Commission here was not applying the Communications Act which is the agency's expert province, but was applying general common law precepts of contract construction in which the agency has no particular expertise. Accordingly, the argument continues, the Commission here is entitled to no greater deference from this court than would be due a district court in a breach of contract action. We cannot agree.

WU makes no attempt to harmonize its argument for a more stringent standard of review with the apparently clear language of the Administrative Procedure Act. We find no ambiguity in the statutory standard. Nor do we perceive any intimation that an agency's resort to general legal precepts in determining a matter within the ambit of its expertise sufficies [*sic*] to divest that determination of judicial deference otherwise due. Certainly, this controversy falls within the ambit of the FCC's expertise. These agreements involve complex, sophisticated, and rapidly-evolving communications technology. Quite properly, WU took the matter to the FCC for resolution, not to a district court.[7] Moreover, the agreements impli-

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[7] An attempt to initiate this proceeding in the district court would probably have resulted in a reference to the FCC under the doctrine of primary jurisdiction. "Under the doctrine, a court should refer a matter to an administrative agency for resolution, even if the matter is otherwise properly before the court, if it appears that the matter involves technical or policy considerations which are

cate questions of national regulatory policy. They concern the applicability of Commission-approved tariffs intended to provide access to all common carriers on reasonable and non-discriminatory terms. Under these circumstances, the fact that these are private agreements cannot alter the statutory deference due the Commission. *See North Atlantic Westbound Freight Ass'n* v. *FMC*, 397 F.2d 683, 685 (D.C. Cir. 1968); *Manufacturers Light & Heat Co.* v. *FPC*, 374 F.2d 88, 89 (3d Cir. 1967). We will upset the Commission's conclusion concerning FX and CCSA only if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Meadville Master Antenna, Inc.* v. *FCC*, —— F.2d ——, No. 75-1889 (3d Cir., April 12, 1976).

WU objects to the FCC's conclusion concerning FX and CCSA in three respects. First, WU focuses on the Commission's determination that the contracts cover the technical facilities that would provide FX and CCSA services. This determination, WU contends, should have been dispositive of the litigation. WU here contends, in effect, for a plenary obligation on the part of AT&T to provide contract facilities for any services that WU might be authorized to, and choose to, provide during the term of the contracts. But the Commission aptly answered this contention: "the question to be resolved is not whether the facilities available under the contracts are capable of furnishing FX and CCSA services, but rather whether the contracts allow the use of these facilities for FX and CCSA services." 53 F.C.C.2d at 1050.

Second, WU takes issue with the Commission's reliance on section 3(d) as defining the services for which contract facilities are available by reference to services being provided by WU at the time of contracting in 1970.

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beyond the court's ordinary competence and within the agency's particular field of expertise." *MCI Communications Corp.* v. *AT&T*, 496 F.2d 214, 220 (3d Cir. 1974).

WU argues that the purpose of section 3(d) is not to define services for which contract facilities are available, but is "to acknowledge that such service connection configurations are consistent with these facilities contracts." (Petitioner's Brief at 22.) According to WU, section 3(d) contemplates an arrangement where WU would lease *facilities* at contract rates and *services* at tariff rates.[8] AT&T's response is multi-faceted. Distilled to its essence, however, it is that WU's interpretation results in an "open-ended" obligation to provide facilities at contract rates, and that other contract provisions evidence no intention on the part of AT&T to assume such an obligation. Most particularly, AT&T points to section 3(b), note 3 *supra*, with its enumeration of five specific instances in which circuits leased to WU under contract may be connected with other circuits, and its requirement of AT&T approval for other connections. AT&T also points to section 2(d)[9] of Contract No. 2, and section 2(g)[10] of Contract No. 1 (identically reproduced in

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[8] WU also argues that the FCC's reference to 1970 tariffs in interpreting the contracts will have the "preposterous consequences" that all provisions of such tariffs "would be frozen as of that date for the life of the contract." (Petitioner's Brief at 25.) We fail to see the logic of this argument. There is no apparent logical connection between the Commission's reference to 1970 tariffs as part of the process of construing these private exchange of facilities contracts, and the statement that all provisions of the tariffs will be frozen. If there is a logical connection, it escapes our powers of discernment.

[9] (d) Access and connection to a circuit section furnished hereunder may be had at points of termination of such circuit section only by means of local terminal circuits procured from the lessor or from its connecting telephone company by separate agreement, or by connections made by the lessee upon special approval by the lessor.

(App. at 0111.)

[10] (g) This Agreement does not apply to the furnishing by either party to the other of any telephone or telegraph services or facilities under published tariffs.

(App. at 0087.)

section 2(f) of Contract No. 2), as evidence that the parties did not contemplate the obligation that WU seeks to impose. AT&T, of course, vigorously supports the FCC's reference to 1970 as the time for judging the scope of the parties' obligations, asserting that "it is clear that section 3, read as a whole, plainly mandates" such a reference. (Intervenors' Brief at 31.)

Unfortunately, what is clear and plain to the advocates is not always clear and plain to the court. This aspect of the argument is slippery. But we need not decide what result we would reach if faced with the necessity of construing de novo these Delphic contractual provisions. What is clear only is that it is not clear what these provisions, especially section 3(d), mean. Certainly, it was not arbitrary or capricious to conclude, as the Commission did, that the contracts embodied some limitation on AT&T's obligation to provide facilities technically covered by the specifications of the contracts. Neither, we believe, was it arbitrary or capricious for the Commission to interpret section 3(d) as imposing that limitation by referencing the contracts to the time of contracting. Accordingly, we reject WU's argument concerning the interpretation of section 3(d).

Finally, WU contends that the Commission's decision was tainted by the application of erroneous standards of law, to-wit, by consideration of parol evidence as to the contracting parties' intentions, and by adoption of a policy of strict construction of the exchange of facilities contracts. WU's parol evidence contention is based on the Commission's consideration of an affidavit concerning AT&T's intentions during the negotiations and in the execution of the contracts.[11] For this contention to

[11] Our interpretation of the contracts is further buttressed by the affidavits submitted by both parties in an attempt to explain each party's intentions at the time of contracting. AT&T affirmatively states that "[d]uring the negotiations, and in the execution of the contracts, it was not contemplated by those representing the Bell System that the contracts covered connection of Bell System services or facilities with Western Union services or facilities for FX or CCSA services, or that facilities would be furnished to Western Union under the contracts for such purposes." On the other hand, Western Union did not state that, at the time of negotiations, it was intended that facilities obtained under the contracts could be used for FX or CCSA services or any other Western Union services which required connection to Bell System services and which were not already allowed by tariffs in effect at the time of the signing. Rather Western Union merely states that at no time prior to the execution of the contracts did AT&T inform Western Union that the contracts did not cover leasing of Bell System facilities to Western Union for FX or CCSA services. Thus the intentions of the parties at the time of contracting, as shown by the affidavits of the parties, was that contract facilities could not be used for FX and CCSA services.

53 F.C.C.2d at 1051 n.12.

have logical validity, WU would have to establish at a minimum: (a) as a matter of administrative law, that the Commission was bound to apply the parol evidence rule, and (b) as a matter of contract law,[12] that the rule was applicable. WU has not established either of these propositions. We have strong doubts on both scores, but we have no occasion to go further than the basic precept of administrative law set forth in § 556(d) of the Administrative Procedure Act: "Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence." 5 U.S.C. § 556(d).[13] The paramount issue being the real intention

[12] Referring to the parol evidence rule, Professor Thayer said: "Few things are darker than this, or fuller of subtle difficulties." THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT COMMON LAW 390 (1898). *See, e.g., United States* v. *Clementon Sewerage Authority*, 365 F.2d 609, 613-14 (3d Cir. 1966).

[13] "If these words mean what they say, an agency whose action is subject to this provision cannot commit error by admitting particular evidence, no matter how incompetent or irrelevant the evidence may be." K. DAVIS, ADMINISTRATIVE LAW TREATISE § 14.08, at 282 (1958).

of the parties, *Ludwig Honold Manufacturing Co.* v. *Fletcher*, 405 F.2d 1123, 1131 (3d Cir. 1969), and the Commission having obviously concluded that an affidavit speaking to that issue was not "irrelevant, immaterial, or unduly repetitious", we are not in a position to gainsay that conclusion.[14] The Commission considered a similar affidavit supplied by WU, note 11 *supra*, so clearly the practice here was even-handed. And, in any event, the agency's opinion makes clear that the affidavits were not dispositive in effect; they merely "buttressed" its conclusions concerning FX and CCSA. *Ibid.* We reject the parol evidence argument.

WU gets no further with its attack on the FCC's announced policy of strict construction of the exchange of facilities contracts.[15] WU interprets this as a policy to construe the contracts "not in accord with their literal meaning, but as narrowly as possible" and asserts that such a policy "necessarily would stem from authority granted the agency in the Communications Act to abrogate, set aside or modify the contracts, and it is settled that no such authority exists, except possibly under for-

[14] We recognize that the parol evidence rule is frequently said to be a rule of substantive law and not a rule of evidence. *E.g.*, *United States* v. *Clementon Sewerage Authority*, *supra* note 12, 365 F.2d at 613; J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS § 43, at 86 (1970). No reason is apparent why the FCC could not apply the rule as a matter of substantive law or policy, if it chose to do so, but we hardly imagine that it is required to do so in view of the plain language of § 556(d) that "[a]ny oral or documentary evidence may be received."

[15] The Commission is cognizant that if the contract rates do apply a disparity in treatment among carriers will exist. Such a disparity, if unjustified, would be manifestly contradictory to the Commission's often enunciated policy of fair and full competition and its policy that tariffs, rather than contracts, should generally govern these matters. Because of this the Commission intends to strictly construe the Bell-Western Union contracts.

49 F.C.C.2d at 322.

mal hearing procedures, not followed here." (Petitioner's Brief at 31-32.) This argument misconceives the agency's action: the Commission here did not abrogate, set aside or modify the contracts, it construed them. Of course, opinions may differ as to the proper limits and results of construction. But where, as here, the meaning of contractual provisions is contested and unclear, we have no hesitancy in characterizing the process as construction. Moreover, while we would see no impropriety in alertness to policy implications of contract construction, we find no evidence in the decision under review of the application of any particular philosophy of construction, strict or otherwise. We find simply an effort to determine the intentions of the parties embodied in a group of difficult contractual provisions. Again, we can discern no basis to disturb the FCC's conclusions.

We have considered WU's arguments, and we have reviewed the FCC's conclusion that FX and CCSA services are not covered by the exchange of facilities contracts. We do not find that conclusion to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

III.

Turning to the domestic satellite aspect of the petition for review, we again address the threshold question of the proper scope of our review. In this phase of the case, WU makes two substantive arguments: first, that the WU satellite authorization was not, in fact, conditioned on a waiver of contract rights; and second, that any such condition imposed constituted an unlawful expansion of the Commission's regulatory powers. With regard to WU's first argument, our review must be based on determining whether the FCC's action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The reasons set forth previously for applying that standard apply here *a fortiori*. Pri-

marily, this argument turns on an interpretation of the FCC's own prior action in imposing the contested waiver, and upon a factual determination whether WU knowingly and voluntarily accepted its authorization subject to the condition. We will accord the full deference of the statutory standard to the Commission's conclusions on these points. With regard to WU's second argument, our review is of a different character. A claim that agency action is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right", 5 U.S.C. § 706(2)(C), necessarily entails a first-hand judicial comparison of the claimed excessive action with the pertinent statutory authority. *See, e.g., FPC* v. *Moss*, 44 U.S.L.W. 4278 (U.S. Mar. 3, 1976).

In marked contrast to the parties' contractual language previously discussed, the Commission's language in its January, 1973, satellite authorization to WU was quite explicit: "these [satellite] facilities shall be operated in accordance with all Commission policies adopted in Docket No. 16495 and all rules and policies subsequently made applicable to domestic satellite communications." 38 F.C.C.2d at 1199. Having argued that the FX and CCSA contract terms were clear and unambiguous, WU here contends that the Commission's language was not sufficiently clear to give fair notice of a waiver. WU asserts that in January, 1973, it had no reason to suspect that it was waiving contract rights. "No policy was then in effect or subsequently adopted in the orders cited by the FCC compelling Western Union to waive its contract rights in order to receive the requested domestic satellite authority." (Petitioner's Brief at 37.) But the FCC had said in June, 1972, that its objective was "that all carriers providing retail interstate satellite services . . . have access at non-discriminatory terms and conditions to local loop and interchange facilities." 35 F.C.C.2d at 856 (1972). WU is not unsophisticated; at the least

this language adumbrated the possbility that tariffs might be applied. And surely a policy was "subsequently adopted"—in connection with AT&T's satellite application, 42 F.C.C.2d at 656-60—which required that tariffs, not private contracts, govern domestic satellite facilities. The Commission said:

> . . . In summary, as a participant in Docket No. 16495, Western Union was on actual notice of: (a) the Commission's general policy objective on access and interconnection; (b) the regulatory approach adopted by the Commission to develop appropriate *means* to realize such policy objective and; (c) that as a potential domestic satellite licensee it would be subject to any interconnection and access policies adopted by the Commission pursuant to the *Second Report*.
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> . . . [W]e find it difficult to believe that as an established common carrier Western Union would not anticipate, either at the time of our *Second Report* and *Reconsideration Orders* or at the time its authorization was granted, that we might reach the determination after appropriate consideration of AT&T's applications and interconnection proposal that tariffs, rather than private contracts, would be the most appropriate means to assure the realization of our access and interconnection policy objectives which stressed the goal of "reasonable and non-discriminatory" interconnection. In light of the foregoing and Section 203 of the Communications Act, we deem Western Union's claim of lack of notice to be untenable. In any event, Western Union failed to challenge the AT&T grant, and is therefore now bound by that final decision. We conclude that Western Union willingly and knowingly accepted a condition in its domestic satellite authorization, as implemented by the unchallenged AT&T decision, which

constituted a voluntary waiver of its contract rights, if any existed.

53 F.C.C.2d at 1053-54 (1975).

We do not believe that this conclusion was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

WU's final argument—that the imposition of a waiver exceeded the Commission's statutory authority—is not persuasive. The Commission is expressly authorized by statute "to attach to the issuance of [a] certificate such terms and conditions as in its judgment the public convenience and necessity may require." 47 U.S.C. § 214 (c). Recognizing the existence of § 214(c), WU is forced to argue that it cannot be considered as authorizing the Commission to impose a waiver of contract rights as a condition. The gravamen of the argument is that such an interpretation would allow the Commission to do "indirectly" by condition what it is forbidden to do "directly" by tariff, viz., modify or abrogate contracts. *Bell Telephone Co.* v. *FCC*, *supra*. The argument fails because of the brute fact that there is a significant difference between a voluntary waiver of rights in order to secure a benefit not otherwise obtainable,[16] and the extinguishment of rights by tariffs which provide no *quid pro quo*. Keeping in mind also that § 214 applies only to *new* lines or extensions, we see no inconsistency between the condition imposed in this case and the rule of *Bell Telephone Co.* v. *FCC* that the Act does not authorize the abrogation or modification of contracts by subsequently filed tariffs. The Commission specifically stated that "[t]he condition we imposed on Western Union's authori-

[16] "When an applicant accepts a Government permit which is subject to certain conditions, he cannot later assert alleged rights which the permit required him to surrender in order to receive it." *Capital Telephone Co.* v. *FCC*, 498 F.2d 734, 740 (D.C. Cir. 1974).

zation is reasonable and in our judgment serves the public convenience and necessity in assuring flexibile regulation of domestic satellite communications and the provision of services and facilities on a reasonable and non-discriminatory basis." 53 F.C.C.2d at 1055 (1975). Far from overstepping its statutory bounds, the Commission appears to have acted carefully and consciously within the express language of § 214(c). We decline to hold the Commission's action unlawful.

We have considered all the contentions raised by the petition for review. The petition will be denied.

Chief Judge Seitz joins in Judge Aldisert's opinion. However, even assuming that the dissenting opinion has stated the applicable scope of review, he would still deny the petition for review.

GARTH, *Circuit Judge*, dissenting:

The majority's resolution of this petition for review has, in my view, dangerously limited the scope of judicial scrutiny of administrative decisions. The administrative agency's interpretation of the contracts at issue here was based solely upon principles of contract construction and *not* agency expertise. In according deference to the Federal Communications Commission's interpretation of these contracts, I believe the majority has given the agency virtually unreviewable power in matters of law, a power denied to federal district courts, although courts are presumably expert in such matters. Reason compels no such abdication of our appellate function, nor does it require substitution of our normal *de novo* standard of review for the standard employed by the majority.

I.

As stated by the majority (Majority Op. at 5-9), the matters in issue here follow directly from the Federal Communications Commission's (FCC) order dated April 23, 1974 which this Court affirmed in *Bell Telephone Co. of Pennsylvania* v. *F.C.C.*, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 423 U.S. 886 (1975). That order required the American Telephone and Telegraph Company (AT &T) and the Bell System Operating Companies (Bell) to furnish specialized common carriers,[1] including Western Union, with interconnection facilities pursuant to tariffs for foreign exchange (FX) and common control switching arrangement (CCSA)[2] services. However, the April 23, 1974 order provided that the Bell Companies could not abrogate Western Union's existing contractual rights through the adoption of tariffs. Therefore, interconnection facilities would be available to Western Union for FX and CCSA services at contract rate if these facilities were covered by the Bell-Western Union exchange of facilities contracts, and would otherwise be available at tariff rate.

Thereafter, Western Union requested that the Bell Companies furnish interconnection facilities for FX,

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[1] *See* Bell Telephone Co. of Pennsylvania v. F.C.C., 503 F.2d at 1254, n.3, where this Court stated:

> A "specialized" common carrier is a carrier that does not provide the full range of communications services contemplated by the Communications Act, 47 U.S.C. § 151 et seq. For the purposes of this opinion, the phrase "specialized common carrier" shall refer to carriers who specialize in "private line services."
>
> "Private line service" provides the large-scale telephone customer with full-time private circuits for the transmission of communications between locations specified by the customer. The service operates to give the customer continuous communication without requiring the carrier to establish a new connection for each call or message.

[2] *See* Majority Op. at n.1.

CCSA, and domestic satellite communication services at the lower contract rates. The Bell Companies refused, claiming that these facilities were only available under tariffs. As a result Western Union filed complaints with the FCC against AT&T and the Bell Companies. It is these complaints that give rise to this petition for review.

I am in complete accord with the majority's statement that our review of the FCC orders at issue here is governed by section 10(e) of the Administrative Procedure Act (APA), 5 U.S.C. § 706(a)(2)(A). That section states in pertinent part:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of an agency action. The reviewing court shall—
>
> . . .
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law, . . .

However, I believe § 706(a)(2)(A) does not create a single standard of review applicable to all situations. The phrase "arbitrary, capricious, and abuse of discretion, *or* otherwise not in accordance with law" is worded in the disjunctive, thereby providing alternative tests for scrutinizing agency action. While the standard of arbitrary, capricious, and abuse of discretion is appropriate in some instances, Congress has required the reviewing court to "decide all revelant questions of law" and thereafter to set aside agency determinations "not in accordance with law." The APA thus recognizes a basic postulate of our system of appellate jurisprudence—that while deference

must be accorded to judgments of lower tribunals based upon factors within their special knowledge or experience, an appellate court is entrusted with plenary, *de novo* review of all questions of law. Consequently, I believe a determination of the appropriate APA standard of review can only be made after examining the type of agency action presented in this petition.

The FCC characterized the FX-CCSA issue as purely a question of contract construction—whether "the Bell-Western Union exchange of facilities contracts cover the leasing of interconnection facilities to be used in furnishing FX-CCSA services." 53 F.C.C.2d 1045 (1975). Moreover, in resolving this legal problem the FCC relied solely upon principles of contract law. Paragraph 16 of the Memorandum Opinion and Order of June 24, 1975 states:

> 16. Foreign exchange (FX) service involves the connection of a pure private line service to a local exchange service, and CCSA service is a switched private line service involving the connection of various private line services through AT&T's Common Control Switching Arrangements (CCSA). For Western Union to provide FX and CCSA service it is necessary in either case to connect Western Union's private line services with Bell services. Thus the controlling provision in the contracts is Section 3(d) which states, in pertinent part, that "Connection of Western Union private line services with Telephone Company services shall be allowed only under the tariffs of the Telephone Company . . . ." The purpose of this provision is to define those situations in which Western Union services utilizing facilities obtained under the contracts, may be connected to Bell services. Since this provision references the applicable telephone company tariffs, the question before us is whether the cross reference to the applicable tariffs is to be made as of the time of contracting (e.g., January 1, 1970) or as of the date

> the interconnection of services is to be made. *The law is well settled that all parts or sections of a contract must be given effect, force and meaning, if possible, and if it can fairly and reasonably be done; and that a construction rendering a provision or term meaningless or superfluous should be avoided.*[11] If there were no Section 3(d) in the contract, then the terms and conditions governing the connection of Bell services with the services of other common carriers would be found in the then effective applicable Bell System customer tariffs. If the cross reference to the applicable telephone company tariffs is meant to be to the then effective tariff provisions, then Section 3(d) would be superfluous. Therefore, in order to give meaning to Section 3(d), we conclude that the cross reference to applicable telephone company tariffs is to be made as of the time of contracting (e.g., January 1, 1970). Since the telephone company tariffs, at that time, did not allow Western Union to interconnect its private line services with Bell's services for the purpose of providing its own FX and CCSA services, we conclude that Western Union may not obtain under the contracts, facilities which would be used in the provision of FX and CCSA services. Western Union may, of course, obtain such facilities pursuant to Bell tariffs on file with this Commission, in the same manner and at the same rates as other common carriers offering FX and CCSA type services.[12] (Footnote 12 omitted) (Emphasis added.)

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[11] *E.g., Meighan* v. *Finn*, 146 F.2d 594 (2nd Cir. 1944), *affirmed* 325 U.S. 300, 65 S. Ct. 1147 (1945); *United Artists Corporation* v. *Strand Productions*, 216 F.2d 305 (9th Cir. 1954); *Ludwig Honold Manufacturing Company* v. *Fletcher*, 405 F.2d 1123 (3rd Cir. 1969); *Gillentine* v. *McKeand*, 426 F.2d 717 (1st Cir. 1970); *see also* 17A C.J.S. Contracts § 297; Williston, Ch. 22, § 619; Restatement of Contracts § 236.

53 F.C.C.2d at 1051.

The second issue concerning the availability of interconnection facilities under the contracts for domestic satellite services also presented a purely legal question—whether Western Union in accepting domestic satellite authorization waived any rights under the contracts. Paragraphs 9 and 10 of the Memorandum Opinion and Order of October 16, 1974 capsulize the FCC's analysis:

> 9. Western Union also sought authorization from the Commission to provide its own domestic satellite communications. These applications were also granted subject to the condition that the facilities would be operated in accordance with Commission policies adopted in the *Second Report and Order*, 35 FCC2d 844 (1972), and "all rules and policies subsequently made applicable to domestic satellite communications. . . ." *Western Union Telegraph Co.*, 38 FCC 2d 1197, 1199 (1973). Western Union willingly accepted such a conditional grant.
>
> 10. *Both Bell and Western Union willingly and knowingly accepted their domestic satellite authorizations subject to the explicit condition that tariffs, not private contracts, would be filed setting forth the charges, classifications, regulations and practices applicable to such facilities. AT&T* 42 FCC2d 654, 659 (1973). *Bell System Tariff Offerings*, 46 FCC2d 413, 437. We held that such tariffs were "the most appropriate means by which to achieve our objective that these facilities [should] be provided to other satellite carriers on 'reasonable and non-discriminatory conditions.'" *AT&T*, 42 FCC2d 654, 659 (1973).[4] *Bell and Western Union thus agreed to waive any rights, in any existed, to obtain such facilities by any means other than a tariff.* Neither can now allege a right to such facilities under any contracts. "When an applicant accepts a government permit which is subject to certain conditions, he cannot later assert alleged rights which the permit required him to surrender in order to receive it."

> *Capital Telephone Company* v. *Federal Communications Commission*, slip op. 11, No. 72-1715, D.C. Cir., May 24, 1974. [498 F.2d 734, 740]. (Emphasis added.)

49 F.C.C.2d 321, 323 (1974). On reconsideration of this opinion and order the FCC further expanded upon its waiver theory still relying upon the precise terms of the satellite grant (*see* p. 32, *infra*). 53 F.C.C.2d at 1052-55.

The majority regards this issue of waiver as a factual determination (Majority Op. at 16) which is again subject to the "arbitrary, capricious, and abuse of discretion" standard. I cannot agree. The Commission itself has predicated Western Union's "waiver" solely upon the precise terms of its grant of domestic satellite authorization. Thus, in holding that Western Union "waived" its contract rights, the FCC relied upon no factual determination and did not go outside the exact terms of the grant. Nor did the question of Western Union's knowing and willing relinquishment of any rights under its contracts involve the FCC's interpretation of its own prior actions. For "waiver" looks to the knowledge and conduct of Western Union at the time of accepting the grant and not to the FCC's subsequent interpretation of its own intent in authorizing the grant. Thus, while I acknowledge that deference is accorded to an agency's interpretation of its own actions or agreements where the issue may involve the meaning of that particular action or agreement, I see no basis for "deference" when the issue for determination necessarily arises from the knowledge, conduct, and intent of third parties such as Western Union here.

Since the waiver here involves neither factual conclusions, nor interpretation requiring agency expertise, I find no basis for applying an "arbitrary or capricious" standard which is traditionally applied in such circumstances. Rather, here ". . . where the only evidence as to waiver is a writing, its construction and interpretation and

whether or not it constitutes a waiver is a question of law for the court." *Hanover Construction Co.* v. *Fehr*, 392 Pa. 199, 139 A.2d 656, 658 (1958); *Griffin* v. *United States of America*, 500 F.2d 1059, 1072 (3d Cir. 1974); *Crabb* v. *Commissioner of Internal Revenue*, 121 F.2d 1015 (5th Cir. 1941). Hence the appropriate APA standard to be applied here is the standard of "not in accordance with law," a standard which requires a plenary, *de novo* review of the documents in question.

Applying strictly legal principles, the FCC concluded that the Bell-Western Union contracts did not extend to facilities for FX and CCSA services and that Western Union waived any contract rights with respect to domestic satellite services. In reviewing decisions that are grounded upon principles of contract law, their "validity must likewise be judged on that basis. The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." *S.E.C.* v. *Chenery Corp.*, 318 U.S. 80, 87 (1943); *Texas Gas Corp.* v. *Shell Oil Co.*, 363 U.S. 263, 270 (1960). Hence, I conceive of our function as being one of reviewing the FCC's application of strictly legal precepts to the Bell-Western Union controversy.

However, the majority evidently does not share in this view. Instead the majority has characterized the matter before us as

> . . . an agency's resort to general legal precepts in determining a matter within the ambit of its expertise . . . . Certainly this controversy falls with the ambit of the FCC's expertise. These agreements involve complex, sophisticated, and rapidly-evolving communications technology . . . . Moreover, the agreements implicate questions of national regulatory policy . . . .

Majority Op. at 10. Although the FCC does exercise special competence with respect to the many decisions entrusted to it under the Federal Communications Act, 47 U.S.C. § 151 *et seq.*, I know of no reason to conclude that this competence extends to the subject of contract construction—an area that has traditionally been considered within the special province of a court's expertise. Moreover, even if the FCC had special ability in such matters, its decisions here were predicated *solely* on the basis of contract law and not upon any expertise or policy considerations. Thus, the possibility that this controversy falls within the special competence of the FCC is irrelevant to our consideration since "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." *S.E.C.* v. *Chenery Corp.*, *supra* at 87. Hence, I believe our review is strictly limited to the FCC's application of contract principles to the issues presented.

Our initial inquiry as to the appropriate APA standard for review of the FCC orders presented here may be further refined as follows: Which of the § 706(a)(2)(A) standards—"arbitrary, capricious, an abuse of discretion" or "not in accordance with law"—must we apply in reviewing agency decisions that are based exclusively upon principles of contract law? This is by no means a question of first impression. In a similar context, this Court, without even discussing its scope of review, considered *de novo* the Federal Power Commission's interpretation of a clause in a contract for the sale of natural gas. *Shell Oil Co.* v. *F.P.C.*, 263 F.2d 223 (3d Cir. 1959). Our plenary review of the contract in *Shell Oil Co.* resulted in a petition for certiorari which the Supreme Court granted, having been "particularly moved to do so by the contention . . . that the Court of Appeals exceeded the appropriate scope of judicial review of the Commission's determination." *Texas Gas Corp.* v. *Shell Oil Co.*, 363 U.S. 263, 268 (1960).

The Supreme Court analyzed the challenge to this Court's review of the F.P.C. contract interpretation as follows:

> We may assume with the petitioners that the Court of Appeals did not treat the Commission's order as one which it was required to accept if reasonably supported in the record, and instead considered that it could examine *de novo* the question of the proper interpretation to be given the Shell "favored nation" clause. The petitioners' argument that the Court of Appeals exceeded the allowable limits of judicial review is based upon the premise that the Commission's interpretation of the "favored nation" clause reflects the application of its expert knowledge and judgment to a highly technical field, so that the Court of Appeals was required to accept the Commission's interpretation if it had " 'warrant in the record' and a 'reasonable basis in law,' " citing *Unemployment Compensation Comm'n* v. *Aragon*, 329 U.S. 143, 153-154. But the record nowhere discloses that the Commission arrived at its interpretation of the "favored nation" clause on the basis of specialized knowledge gained from experience in the regulation of the natural gas business, or upon the basis of any trade practice concerning "favored nation" clauses. On the contrary the opinions of the examiner and the Commission show that both treated the question as one to be determined simply by the application of ordinary rules of contract construction.

363 U.S. at 268-69. I can find no difference between the standard of review actually applied by the majority here and the position urged by the petitioners upon the Supreme Court in *Texas Gas Corp., supra.* Therefore, the Supreme Court's total rejection of the petitioner's argument in *Texas Gas Corp.* and its affirmance of this

Court's standards of *de novo* review,[3] makes, in my view, the majority's position here untenable.

Confronted with precisely the same question as we are here as to the appropriate standard for review for an agency's contract interpretation, the Supreme Court stated:

> "The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." *Securities & Exchange Comm'n* v. *Chenery Corp.*, 318 U.S. 80, 87. Therefore, since the Commission professed to dispose of the case solely upon its view of the result called for by the application of canons of contract construction employed by the courts, and did not in any wise rely on matters within its special competence, the Court of Appeals was fully justified in making its own independent determination of the correct application of the governing principles. See *Federal Communications Comm'n* v. *RCA Communications, Inc.*, 346 U.S. 86, 91. There applies here what the Court said in *Chenery*: "Since the decision of the Commission was explicitly based upon the applicability of principles [of contract interpretation] announced by courts, its validity must likewise be judged on that basis." 318 U.S., at 87.

363 U.S. at 270. Thus, where an administrative agency's construction of a contract was based solely upon legal principles, the Supreme Court held that this Court "was fully justified in making its own independent determination of the correct application of the governing principles." *Id.* at 270. Furthermore, I suggest that *de novo* consideration of an agency's resolution of legal issues is not only "justified" but mandated by the APA. For

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[3] Although the Supreme Court affirmed this Court's standard of review, it reached a different interpretation of the contract clause at issue. Hence the Supreme Court reversed this Court's decision on the merits.

§ 706(a) requires that "the reviewing court . . . decide all relevant questions of law. . . ." Thus, this Court's position with respect to the proper standard of review in *Shell Oil Company* v. *F.P.C.* as approved by the Supreme Court in *Texas Gas Corp.* and the very terms of the APA are, in my view, dispositive of the issue presented here.

Reason, in addition to controlling authority, argues against any other conclusion here. The scope of appellate review of agency actions reflects to varying degrees the limited competence of an appellate tribunal to pass upon matters that involve specialized knowledge and important policy considerations. In such matters deference must be shown to the administrative agency specially created by Congress to make decisions based upon expertise. However, when, as here, an agency relies upon strictly legal principles to resolve a controversy, an appellate court is at least equally capable, and probably more capable, of applying the legal precepts involved. Moreover, when a district court in an identical situation resolves questions of contract law, this Court engages in *de novo* consideration of the issues. Thus, I perceive no basis which requires this Court to give special consideration to the application of legal principles by an administrative agency. Indeed, I believe the very opposite is called for.

Nor am I in the least persuaded by the two cases cited by majority in support of its view that deference should be accorded to the FCC's interpretation of the contract questions at issue here. In *Manufacturers Light and Heat Co.* v. *F.P.C.*, 374 F.2d 88 (3d Cir. 1967) (*per curiam*), this Court granted "substantial weight to the expert judgment of the Commission" in the interpretation of a settlement agreement which had been confirmed by the F.P.C. in a rate proceeding as to which the F.P.C. was itself a party. The issue of how refunds

under the agreement should be properly allocated implicated the special knowledge of the F.P.C., and therefore this Court properly concluded that the F.P.C.'s judgment should "not be lightly regarded." *Id.* at 89.

Furthermore, the majority's reliance upon *North Atlantic Westbound Freight Assoc.* v. *Federal Maritime Comm'n*, 397 F.2d 683 (D.C. Cir. 1968) (*per curiam*), is also inapposite. There, with respect to judicial review of conference agreements in the maritime freight industry, the Court of Appeals stated:

> Certainly where underlying issues of fact or policy are involved an agency's interpretation of agreements is due judicial respect and deference . . . . Specifically in regard to conference agreements, the Commission is to be given "reasonable leeway in delineating the scope" of these agreements. . . .

397 F.2d at 685. However, here, there is no suggestion that the FCC's interpretation of the Bell-Western Union contracts was based upon underlying issues of fact or policy. Nor are these Bell-Western Union contracts analogous to the industry-wide conference agreements at issue in *North Atlantic Westbound Freight Assoc.* Thus, I can only conclude that the majority's reliance upon these cases is completely misplaced.

Summarizing my view, since the FCC orders before us were decided strictly upon legal principles, I believe our task under the APA is to determine whether these agency actions are "in accordance with law." 5 U.S.C. § 706(a)(2)(A). In resolving such legal questions, our scope of review is both plenary and *de novo*. Since the APA does not suggest but *requires* that we "decide all relevant questions of law," I can find no authority for the majority's assertion that agency determinations of legal questions must be accorded special consideration or deference. Therefore, I believe this Court is required to

engage in an independent review of the FCC's decisions concerning the availability of interconnection facilities for Western Union's FX, CCSA, and domestic satellite services.

II.

Based upon a *de novo* review of the legal issues presented, *see* Part I, *supra*, I believe the FCC's interpretation of the Bell-Western Union contracts is unwarranted and tortured. As explained by the majority, *see* Majority Op. at 6-8, the thrust of the FCC's decision is found in Paragraph 16 of the Memorandum Opinion and Order of June 24, 1975, 53 F.C.C.2d 1045 (1975). *See* p. 22 *supra*. There the FCC concluded that Section 3(d) "define[d] those situations in which Western Union services utilizing facilities obtained under the contracts, may be connected to Bell services." In "order to give meaning to Section 3(d)," the FCC construed this provision as allowing for the connection of Western Union services utilizing contract facilities to only those Bell services for which tariffs existed as of the time of contracting, January 1, 1970. Therefore, under the Commission's analysis, the facilities necessary for Western Union's FX and CCSA services were not available under the contracts since Bell tariffs in existence on January 1, 1970 did not allow for the connection of Western Union services with Bell FX and CCSA services.

I begin my analysis of these contracts with section 2, which describes the general undertaking of the parties. Under section 2 each party agreed to "lease to the other . . . circuits and certain related facilities, to be operated by the lessee as part of or in connection with its plant . . . *in furnishing communication service to the public.*" (Emphasis added.) App. 86-87; 110-111. FX and CCSA, two particular types of private line services, clearly constitute a type of "communication service to the public."

The only explicit limitation placed upon the uses for which facilities subject to the contracts could be put is found in section 3. Under section 3(a),

> . . . circuits leased to the Telegraph Company [Western Union] hereunder may be used only *in providing its common carrier communications services for which such circuits are suitable.* (Emphasis added.)

App. 87, 112. Here, Western Union sought to lease contract facilities to furnish FX and CCSA services, both of which are "common carrier communications services." Furthermore, the FCC implicitly recognized the "suitability" of these facilities for Western Union's private line services when it concluded:

> . . . from a purely technical or operational viewpoint, it appears that the circuits and related facilities specified in the contracts provide the capability for Western Union to access Bell's exchange and CCSA switching equipment, thus making it physically possible for Western Union to use contract facilities for its own FX and CCSA services.

53 F.C.C.2d at 1050.

Sections 2 and 3 of the contracts thus indicate the parties' intentions to permit the leasing of all facilities so long as they were used for common carrier communications services and the facilities were suitable for this purpose. The parties, sophisticated corporations in the communications industry, placed no limitation on the particular type of communications services for which the facilities could be used. Nor do I believe that section 3(d), which the Commission relied on, imposes any such limitations.

Section 3(d) simply provides for the connection of Western Union services with Bell services:

> Connection of Western Union private line services with Telephone Company services shall be allowed

> only under the tariffs of the Telephone Company and consistent with the terms and conditions of such tariffs applicable to the connection of Western Union provided services with services of the Telephone Company. No such connection shall at any time be made in any jurisdiction except as duly authorized by tariffs in force and effect.

App. 89. Whereas the other portions of the contracts provide that facilities will be available at contract rate, this section provides that tariff, rather than contract rate, shall govern the interconnection of services. There is no indication that this section was intended to freeze the types of service for which facilities under the contracts could be used. Moreover, the last sentence of the section, ignored by both the FCC and the majority here, further supports my interpretation. That sentence states: "No such connection shall at any time be made in any jurisdiction except as duly authorized by tariffs in force and effect." This specification that connection was only to be made at "tariffs in force and effect" constitutes an implicit recognition that the services subject to tariff as well as the amount of the tariff were subject to change. Thus, it would seem that only the tariffs "in force and effect" at any particular time are relevant to the question of whether Western Union and Bell services may be connected under section 3(d).

Nor does such a construction render section 3(d) superfluous as the FCC suggests. The provision represents agreement by the parties that the services offered by each may be connected, and it establishes the rate which governs such connection. Such a provision is both meaningful and significant. Whether, in the absence of such a provision, the services could be connected at the prevailing tariffs is irrelevant to parties' desire to reduce this matter to writing and thereby avoid a possible area of dispute.

In concluding that the FCC erred in its interpretation of the Bell-Western Union contracts, I see no need to reach or decide Western Union's arguments concerning the parol evidence rule or the Commission's strict construction of the contracts. Hence, I would conclude based upon a *de novo* review that the facilities necessary for Western Union's FX and CCSA services are available under the Bell-Western Union contracts.

III.

Exercising an independent judgment as to the second issue presented—whether acceptance of domestic satellite authorization constituted a waiver of any rights under the contracts—I cannot agree with the FCC's decision. As previously stated, pp. 22-23, *supra*, the FCC concluded that Western Union had waived its rights, if any existed, under the Bell-Western Union contracts in accepting its satellite authorization. In reaching this determination the Commission relied upon the condition in the Western Union satellite authorization that the facilities be operated in accordance with the *Second Report and Order*, 35 F.C.C.2d 844 (1972) and "all rules and policies subsequently made applicable to domestic satellite communications." Thereafter the FCC decided that tariffs were the "most appropriate means" to achieve the availability of facilities on non-discriminatory terms. Based upon Western Union's conditional grant, the Commission concluded that it had "willingly and knowingly accepted [its] . . . domestic satellite authorizations subject to the explicit condition that tariffs, not private contracts" would apply to interconnection facilities. 49 F.C.C.2d at 323.

In denying reconsideration of the October 16, 1974 domestic satellite communication decision, the Commission altered its analysis. Although still relying upon the conditional satellite authorization, the Commission stated:

As to whether such condition placed Western Union on actual notice of the nature of the interconnection requirement we find it difficult to believe that as an established common carrier Western Union would not anticipate, either at the time of our *Second Report and Reconsideration Orders* or at the time its authorization was granted, that we might reach the determination after appropriate consideration of AT&T's applications and interconnection proposal that tariffs, rather than private contracts, would be the most appropriate means to assure the realization of our access and interconnection policy objectives which stressed the goal of "reasonable and non-discriminatory" interconnection. In light of the foregoing and Section 203 of the Communications Act, we deem Western Union's claim of lack of notice to be untenable.

53 F.C.C.2d at 1054. This shift, from concluding that Western Union "willingly and knowingly" accepted its authorization subject to tariffs to concluding that Western Union must have "anticipate[d]" the tariff policy, in and of itself suggests the slippery quality of the FCC's reasoning. Moreover, when the FCC decisions concerning domestic satellite communications are read in light of Western Union's satellite authorization, I believe the Commission's finding of a knowing and voluntary waiver cannot be sustained.

The Commission's *Second Report and Order*, 35 F.C.C. 2d 844 (1972), provides the starting point for analyzing the issue presented here. There the Commission stated with respect to domestic satellite communications:

> . . . we will require existing terrestial carriers seeking domestic satellite authorizations to submit for commission approval, prior to action on their applications, a description of the kinds of interconnection arrangements they will make available to other satellite systems and/or earth station licensees . . .

35 F.C.C.2d at 856. This policy was designed to accomplish the Commission's "objective of assuring that all carriers providing retail interstate services . . . have access at non-discriminatory terms and conditions to local loop and interchange facilities as necessary for the purpose of originating and terminating such interstate services to their customers." *Id.*

Thereafter, Western Union applied for satellite communication authorization. The FCC granted Western Union the right to construct three satellites subject to certain terms and conditions. As specified in that order the Commission required that "these facilities should be operated in accordance with all Commission policies adopted in Docket No. 16495 [*Second Report and Order*] and all rules and policies subsequently made applicable to domestic satellite communications." *Western Union Telegraph Co.*, 38 F.C.C.2d 1197, 1199 (1973).

The Commission's major policy pronouncement with respect to satellite communications came one year after the *Second Report and Order* in the grant of satellite authorization to AT&T. In this proceeding the FCC rejected AT&T's proposal that it furnish interconnection facilities to other satellite service carriers "on a negotiated contract basis." *American Telephone & Telegraph Co.*, 42 F.C.C.2d 654 (1973). Instead the Commission determined that "the filing of tariff schedules rather than the negotiation of private contracts is the most appropriate means by which to achieve our objective that these facilities shall be provided to other satellite carriers on 'reasonable and non-discriminatory conditions.'" *Id.* at 659.

The question presented here is whether Western Union, in accepting its satellite authorization, waived any rights that might exist under the Bell-Western Union contracts and consequently became bound by the tariff rate. In ac-

cepting the satellite authorization, Western Union became subject to the Commission's general policies with respect to satellite communication set forth in the *Second Report and Order*, 35 F.C.C.2d 844 (1972). In this report the Commission sought to ensure satellite communication carriers "access at non-discriminatory terms and conditions to local loop and interchange facilities. . . ." *Id.* at 856. However, the Commission did not express any opinion as to whether contract or tariff rates should govern the lease of such facilities.

Nor should Western Union have assumed that only *tariff rates* would be consistent with non-discriminatory terms. For the leasing of interconnection facilities under contracts as well as tariffs had long been an accepted practice in the communications industry, a practice which this Court subsequently upheld in *Bell Telephone Co. of Pennsylvania* v. *F.C.C., supra.*

Thus, nothing in the *Second Report* announced in 1972 apprised Western Union that its acceptance of satellite authorization was in any way conditioned upon abandonment of its rights under the Bell-Western Union contracts.

Moreover, Western Union's satellite authorization was granted on the further condition that the facilities "be operated in accordance with . . . all rules and policies subsequently made applicable *to domestic satellite communications*. . . ." (Emphasis added.) The question then presented is whether acceptance of authorization under such terms constituted a ". . . voluntary or intentional relinquishment of a known right." *Royal Air Properties, Inc.* v. *Smith*, 333 F.2d 568, 571 (9th Cir. 1964). The grant by its terms refers only to the operations of facilities used in *satellite communications;* it makes no reference to existing interconnection rights of Western Union, a significant matter which the majority has seen

fit to ignore. Thus, there is no basis in the language to conclude that Western Union's acceptance of this grant constituted a "voluntary or intentional" abandonment of any rights that might exist under the Bell-Western Union contracts.

Consequently, I would hold that the Commission erred in concluding that Western Union waived any existing rights to interconnection facilities under the Bell contracts. Such a holding necessarily obviates any consideration on my part of Western Union's second argument that the conditional grant of satellite authorization constituted an unlawful expansion of the Commission's regulatory powers.

IV.

Based upon a *de novo* review of the two legal issues presented, I believe the FCC erred in its interpretation of the Bell-Western Union contracts and the Western Union domestic satellite authorization. Accordingly, I dissent and would grant the petition for review which the majority has denied.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-1796

THE WESTERN UNION TELEGRAPH COMPANY
One Lake Street, Upper Saddle River, New Jersey 07458,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Respondents

AMERICAN TELEPHONE AND TELEGRAPH COMPANY ("AT&T") and THE BELL TELEPHONE COMPANY OF PENNSYLVANIA; THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY, THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND, THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA, THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA, CINCINNATI BELL, INC., DIAMOND STATE TELEPHONE COMPANY, ILLINOIS BELL TELEPHONE COMPANY, INDIANA BELL TELEPHONE COMPANY, MICHIGAN BELL TELEPHONE COMPANY, THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY, NEW JERSEY BELL TELEPHONE COMPANY, NEW YORK TELEPHONE COMPANY, NORTHWESTERN BELL TELEPHONE COMPANY, THE OHIO BELL TELEPHONE COMPANY, PACIFIC NORTHWEST BELL TELEPHONE COMPANY, THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, SOUTH CENTRAL BELL TELEPHONE COMPANY, SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY, SOUTHWESTERN BELL TELEPHONE COMPANY, AND WISCONSIN TELEPHONE COMPANY,
Intervenors

ON PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

Present: SEITZ, *Chief Judge* and ALDISERT and GARTH, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the certified list in lieu of the record from the Federal Communications Commission and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the petition to review the order of the Federal Communications Commission adopted June 18, 1975 and released June 24, 1975 is denied. Costs are taxed against the petitioner.

ATTEST:

/s/ [Illegible]
Clerk

July 28, 1976

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-1796

THE WESTERN UNION TELEGRAPH COMPANY,
Petitioner,
v.
FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents,
AMERICAN TELEPHONE AND TELEGRAPH COMPANY
("AT&T"), ET AL.,
Intervenors.

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge,* and ALDISERT and GARTH, *Circuit Judges.**

The petition for rehearing filed by Petitioner in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Aldisert
Judge

Dated: Aug. 18, 1976

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* Judges Van Dusen, Adams, Gibbons, Rosenn, Hunter and Weis have recused in this case.

Judge Garth would grant the petition for rehearing.

APPENDIX D

FCC 75-726

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of
INTERCONNECTION FACILITIES FOR THE
WESTERN UNION TELEGRAPH CO.

MEMORANDUM OPINION AND ORDER

(Adopted June 18, 1975; Released June 24, 1975)

BY THE COMMISSION: COMMISSIONER HOOKS CONCURRING IN THE RESULT.

1. On October 16, 1974, we released a Memorandum Opinion and Order herein [1] in which we held (1) that AT&T and the Bell System Operating Companies (Bell) are required to provide to The Western Union Telegraph Company (Western Union) interconnecting facilities for its FX and CCSA services,[2] and (2) that the leasing

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[1] 49 F.C.C. 2d 321 (1974).

[2] FX and CCSA, were defined in *Bell System Tariff Offerings of Local Distribution Facilities,* 46 F.C.C. 2d 413, 418 n.5 (1974), *aff'd sub nom., Bell Telephone Company of Pennsylvania* v. *F.C.C.,* 503 F.2d 1250 (3rd Cir. 1974), *cert. denied,* —— U.S. —— (1975), as follows: "Foreign exchange (FX) is a private line service that is partially "switched". It allows a businessman located in one state, to, in effect, maintain a local phone in another state. Under FX, for example, a businessman in Washington can be reached by telephone subscribers in New York City and can himself reach New York City telephone subscribers (through a local loop in Washington, a Washington-New York interexchange line, and a business line in the New York City exchange area). However, New York City telephone subscribers could not reach Washington subscribers other

from Bell of interconnection facilities by Western Union to provide domestic satellite communications services shall be only pursuant to tariffs filed with this Commission. We further requested the parties to submit briefs and reply briefs addressed to the question of whether the Bell-Western Union exchange of facilities contracts cover the leasing of interconnection facilities to be used in furnishing FX and CCSA services.

2. We now have before us the briefs and reply briefs of AT&T and Western Union with respect to FX and CCSA interconnection facilities. We also have before us Western Union's Petition for Reconsideration of that part of our October 16 Memorandum Opinion and Order which held that satellite interconnection facilities shall be provided pursuant to tariff rather than the Bell-Western Union contracts.

FX AND CCSA INTERCONNECTION FACILITIES

3. For nearly 50 years Western Union has leased a substantial portion of its facilities from the the Bell System pursuant to privately negotiated exchange of facilities contracts. The most recent contracts are dated January 1, 1970 and will expire on September 28, 1978 in accordance with notices of termination transmitted to Western Union by the Bell System in September, 1973. Two contracts have been entered into by Western Union, on the one hand, and AT&T and each of the Bell System operating companies on the other hand. Contract No. 1 is applicable to the leasing of facilities within

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than the Washington businessman over FX private line service and the latter would have to maintain a separate telephone in order to tie into the Washington exchange area. A Common Control Switching Arrangement (CCSA) is a private line system for linking the various offices of a large company through large switches on a local telephone company's premises instead of through PBX switches on the customer's premises."

exchange areas, and Contract No. 2 covers the leasing of circuits between exchange areas.

Western Union's Position

4. Western Union claims that Bell System facilities are available under the Bell-Western Union contracts for connection of Western Union's private line services to Bell switching equipment so that Western Union may provide its own FX and CCSA services. In support of its position Western Union claims that for use in providing FX service, it would need to lease circuits between a Western Union office and a central office of the telephone company, terminal loop circuits between a telephone company central office and a customer's premises, and, depending on the location of Western Union's customer, circuits between two or more telephone company central offices. Western Union claims that the only Contract No. 1 facility it would need to connect a CCSA trunk is a circuit between a central office of the telephone company and a Western Union office. Since each of these types of facilities is expressly mentioned in Contract No. 1, Western Union contends that all the facilities necessary for use in providing its own FX and CCSA services are available under Contract No. 1. Moreover, in the event that it needs to obtain interexchange facilities for use in providing its own FX and CCSA services, it claims that the facilities it would require are available under Contract No. 2.

5. In addition, Western Union notes that Section 3(a) of each contract provides that facilities leased to it under the contracts "may be used only in providing its common carrier communications services . . ." Western Union claims that such provision means it may use contract facilities as a link in a service offering to the public but it may not use such facilities for any communications system Western Union may establish for its own in-

ternal use. Western Union claims that this construction is reinforced by Section 2(a) of each contract which specifies that the "circuits and certain related facilities" leased under the contracts are to be used ". . . in furnishing communications services to the public." Further, Western Union claims that it is settled as a result of the Commission decision in *Bell System Tariff Offerings* [3] that FX and CCSA services are private line common carrier services, and, therefore, as soon as Western Union tariffs setting forth the rates, terms and conditions for those services become effective, they will be common carrier services offered by Western Union and thus embraced by Section 3(a) of both contracts. Western Union notes that section 3(a) of each contract further provides that the Bell System facilities may be used only for Western Union services "for which circuits are suitable." Western Union claims that the wire pair facilities described above which are needed for FX and CCSA services, are the same facilities currently available to other specialized common carriers for their FX and CCSA services, pursuant to Bell System facility tariffs. In any event, Western Union's technical officials are satisfied that contract facilities are suitable for it to provide its own FX and CCSA services.

6. Western Union contends that the aforementioned facilities may be used to connect Western Union services with tariffed Bell System services, i.e., FX and CCSA switching services, citing in support of its contention, Section 3(d) of Contract No. 1 which provides as follows:

> (d) Connection of Western Union Private Line Services With Telephone Company Services.
>
> Connection of Western Union private line services with Telephone Company services shall be allowed only under the tariffs of the Telephone Company

[3] *Ibid.*

> and consistent with the terms and conditions of such tariffs applicable to the connection of Western Union provided services with services of the Telephone Company. No such connection shall at any time be made in any jurisdiction except as duly authorized by tariffs in force and effect.

Western Union contends that this Section makes a clear distinction between "facilities" which are available by lease under the contract, and "services", which Bell furnishes pursuant to tariff and that such section applies directly to the present controversy since FX and CCSA are Western Union private line services and the Bell System has filed tariffs permitting interconnection with telephone company FX and CCSA exchange switching equipment. In other words, Western Union claims that interconnection by other common carriers with telephone company FX and CCSA switching equipment is now allowed. In summary, Western Union's position is that on the face of the contracts it is entitled to use contract facilities, i.e., wire pairs, to connect with FX and CCSA services offered by the Bell System pursuant to Bell tariffs.

7. Finally, Western Union argues that the scope of the contracts was not frozen at the time the contracts were executed. It states that the only tariffed service specifically referred to in the contracts is Western Union's public message telegraph service, and that the contracts prohibit Bell from offering public message telegraph service through facilities leased from Western Union (Contract No. 1, § 5(a); Contract No. 2, § 4).[4] Western Union claims that the specific reference to this service, together with the omission of references to other purportedly fore-

[4] For example, Section 4 of Contract No. 2 provides: Circuits leased to the Telephone Company may be used in the public communications business of the Telephone Company but not for public message telegraph service.

closed services such as FX and CCSA, support a construction that the contracts do not, except by their terms, restrict any other utilization of leased facilities. Thus, Western Union claims that the contracts plainly contemplate that it is free to utilize leased Bell facilities to provide any authorized common carrier service. Western Union also claims that the past history of performance under the contracts confirms its interpretation. For example, it notes that the Bell System, without objection has provided contract facilities for Western Union's DATACOM service even though such service was initiated after the contracts were executed in 1970.

AT&T's Position

8. AT&T contends that the contracts do not cover the furnishing to Western Union of the facilities necessary for the provision of FX and CCSA services. AT&T emphasizes that the question of coverage of the contracts has been raised in the context of the issue whether tariff or contract rates apply to interconnection facilities provided by Bell to Western Union to enable Western Union to provide FX and CCSA services.

9. AT&T claims that the general purpose of the contracts was not to establish interconnection contracts, i.e., as contracts to provide for interconnection between Western Union and Bell facilities for through service to the public. Moreover, AT&T claims that the Bell tariffs at the time of the execution of the contracts specifically precluded connection of Bell services with Western Union facilities for FX service, and the specified connections permitted for Western Union under the Bell tariffs did not include connection to Bell CCSA service. AT&T also claims that Western Union did not construe the contracts as including connections or facilities for FX service as evidenced by Western Union's 1971 request to use Bell-provided FX service for the rendition of message tele-

gram service. AT&T contends that Western Union's present intentions are primarily based on the Commission's *Bell System Tariff Offerings* decision rather than upon any claim it may have properly based upon the contracts.

10. AT&T contends that certain specific terms of the contracts show that facilities for FX and CCSA are not covered. AT&T cites the language of Section 3(d) of Contract No. 1 (see para. 6 above), namely, that "[c]onnections of Western Union's private line services with Telephone Company services, shall be allowed only under the tariffs of the Telephone Company . . ." as proof that in order to provide FX and CCSA services, Western Union private line services may be connected with Telephone Company services only under Telephone Company tariffs, and not under the contracts. Furthermore, AT&T notes that its obligation to provide FX and CCSA interconnection facilities is based on Commission decisions and not on the contracts. AT&T also cites Section 3(b) of both contracts which reads as follows:

> (b) Connection of Leased Circuits.
>
> Circuits leased to the Telegraph Company hereunder, or interexchange circuits of the Telegraph Company when connected to such leased circuits, may be directly connected with circuits owned by:
>
> (1) Other telephone companies offering a general telephone service to the public within the continental United States.
>
> (2) The United States Government on military bases, and on reservations of the National Aeronautics and Space Administration.
>
> (3) Electric power, or oil, oil products, or natural gas pipeline companies, or railroad companies where the circuits of such companies are provided primarily to communicate with points located along a right-of-way owned or controlled by such company.

(4) Telegraph Companies offering international telegraph service under filed tariffs, where such circuits are used exclusively in international service and connection is made at terminals within the United States of such circuits.

(5) Telegraph or telephone companies, or government-operated telegraph or telephone systems, operating in countries bordering the continental United States, where such circuits are used exclusively in furnishing service between such countries and the continental United States, and connection is made at terminals within the United States of such circuits.

Any other direct connection of such circuits with circuits of others or of the Telephone Company shall be made only with the written approval of the Telephone Company.

Pointing to the last sentence of this section, AT&T claims that Western Union's provision of FX and CCSA services necessarily requires connection of Western Union circuits with circuits of Bell and that it has not given written approval to connection of Western Union circuits with telephone company circuits for the purposes of FX and CCSA services.

11. AT&T also relies upon Section 2(d) of Contract No. 2 which relates to the connection of circuit sections leased under Contract No. 2 to circuits leased under Contract No. 1.[5] AT&T contends that there is no provision in either contract for the direct connection of a circuit leased under the contracts and terminating in a Tele-

[5] Section 2(d) of Contract No. 2 provides: Access and connection to a circuit section furnished hereunder may be had at points of termination of such circuit section only by means of local terminal circuits procured from the lessor or from its connecting telephone company by separate agreement, or by connections made by the lessee upon special approval by the lessor.

phone Company central office, with a Telephone Company circuit or facility provided as a service—the type of connection required for Western Union's FX and CCSA services. Another provision relied upon by AT&T is found in Section 2(g) of Contract No. 1 and Section 2(f) of Contract No. 2.[6] AT&T claims such provision precludes Western Union from using contract circuits for administrative purposes because service and facilities for such use are obtainable from Bell under tariff. AT&T claims that since Bell facilities for use by other carriers in rendering their common carrier services, including facilities for FX and CCSA services, are now available under tariff, the above provision by its terms excludes from coverage of the contracts any such facilities which may be provided to Western Union for the furnishing of FX and CCSA services.

12. In summary, AT&T claims that the Bell-Western Union exchange of facilities contracts should be strictly construed to avoid any disparity in treatment as between Western Union and competing common carriers, both terrestrial and satellite carriers, and that the Bell-Western Union contracts should also be construed in the light of their basic purpose of providing the companies with facilities to furnish their own communications services to the public. AT&T claims that the agreements are not "interconnection" contracts and did not at the time of execution contemplate Western Union FX and CCSA services. Further, AT&T claims the contracts, by their terms, not only do not cover the furnishing of facilities or services necessary to the furnishing by Western Union of FX and CCSA services but contain restrictive provisions which preclude the furnishing of such facilities or services under the contracts.

[6] Section 2(g) of Contract No. 1 and Section 2(f) of Contract No. 2 provide: This Agreement does not apply to the furnishing by either party to the other of any telephone or telegraph services or facilities under published tariffs.

Discussion

13. We have carefully considered the arguments of Western Union and AT&T and most, importantly, the language of the contracts. We believe the language of the contracts sufficiently states the agreement of the parties as to the scope of the contracts with respect to Western Union's FX and CCSA services.[7] As will be shown, the contracts distinguish between circuits (or facilities) ar[illegible] services. Thus a variety of circuits capable of various uses are offered under the contracts: however the contracts place certain limitations on their use.

14. We do not dispute that under the general terms of the contracts,[8] Western Union may utilize contract circuits and related facilities in furnishing its common carrier communications services to the public but may not use such facilities for its own administrative internal use. Moreover, from a purely technical or operational viewpoint, it appears that the circuits and related facilities specified in the contracts provide the capability for Western Union to access Bell's exchange and CCSA switching equipment, thus making it physically possible for Western Union to use contract facilities for its own FX and CCSA services. However, the aforementioned provisions must be construed in conjunction with other contract provisions which further delineate, and in some cases restrict, how leased circuits or facilities may be used. Such provisions must be construed in light of the fact that in order for Western Union to furnish FX and CCSA services, it must connect with Bell's exchange switching equipment to provide FX service and with Bell's CCSA switching equipment to provide its own

[7] We have also considered the affidavits submitted by both parties in an attempt to explain their intentions at the time of contracting with respect to FX and CCSA. See footnote 12 *infra*.

[8] See Sections 2(a) and 3(a) of both contracts cited above.

CCSA service. Thus, the question to be resolved is not whether the facilities available under the contracts are capable of furnishing FX and CCSA services, but rather whether the contracts allow the use of these facilities for FX and CCSA services. This question can be answered by examining Sections 3(b) and 3(d) of the contracts.

15. A reading of Sections 3(b) and 3(d)[9] shows that the contracts distinguish between circuits (or facilities) and services. Section 3(b) deals with the connection of a circuit leased under the contract to any other circuit or circuits (whether obtained pursuant to another Bell-Western Union contract or otherwise) to enable Western Union to offer a complete private line circuit. Subsection (1) of Section 3(b), for example, allows circuits obtained under contract to be connected with circuits obtained from other telephone companies. Thus, if Western Union wishes to offer a private line circuit, over its own intercity microwave facilities,[10] between customer locations in New York and Washington, D.C., it may need to obtain intraexchange circuits from the local telephone company, at both ends of the line. It may obtain the necessary facilities in New York under its Contract No. 1 with the New York Telephone Company, and Section 3(b)(1) of that contract allows Western Union to connect the circuit obtained from New York Telephone with similar circuitry obtained in Washington. Likewise, Western Union may obtain the necessary facilities in Washington under its Contract No. 1 with the Chesapeake and Potomac Telephone Company, and Section 3(b)(1) of that contract allows Western Union to connect the circuit obtained from C&P Telephone with similar circuitry in New York. Thus Section 3(b) allows the various circuit sections to be pieced together to enable

[9] See paragraphs 6 and 10 above.

[10] If Western Union does not have its own intercity facilities, it may lease these facilities under Contract No. 2.

Western Union to offer its own end-to-end private line service. However, Section 3(b) does not address the situation in which Western Union wishes to connect its private line service with a telephone company service.

16. Foreign exchange (FX) service involves the connection of a pure private line service to a local exchange service, and CCSA service is a switched private line service involving the connection of various private line services through AT&T's Common Control Switching Arrangements (CCSA). For Western Union to provide FX and CCSA service it is necessary in either case to connect Western Union's private line services with Bell services. Thus the controlling provision in the contracts is Section 3(d) which states, in pertinent part, that "Connection of Western Union private line services with Telephone Company services shall be allowed only under the tariffs of the Telephone Company . . . ." The purpose of this provision is to define those situations in which Western Union services utilizing facilities obtained under the contracts, may be connected to Bell services. Since this provision references the applicable telephone company tariffs, the question before us is whether the cross reference to the applicable tariffs is to be made as of the time of contracting (e.g., January 1, 1970) or as of the date the interconnection of services is to be made. The law is well settled that all parts or sections of a contract must be given effect, force and meaning, if possible, and if it can fairly and reasonably be done; and that a construction rendering a provision or term meaningless or superfluous should be avoided.[11] If there were no Section 3(d) in the contract, then the terms and conditions governing the connection

[11] *E.g., Meighan* v. *Finn*, 146 F.2d 594 (2nd Cir. 1944), *affirmed* 325 U.S. 300, 65 S. Ct. 1147 (1945); *United Artists Corporation* v. *Strand Productions*, 216 F.2d 305 (9th Cir. 1954); *Ludwig Honold Manufacturing Company* v. *Fletcher*, 405 F.2d 1123 (3rd Cir. 1969); *Gillentine* v. *McKeand*, 426 F.2d 717 (1st Cir. 1970); *see also* 17A C.J.S. Contracts § 297; Williston, Ch. 22, § 619; Restatement of Contracts § 236.

of Bell services with the services of other common carriers would be found in the then effective applicable Bell System customer tariffs. If the cross reference to the applicable telephone company tariffs is meant to be to the then effective tariff provisions, then Section 3(d) would be superfluous. Therefore, in order to give meaning to Section 3(d), we conclude that the cross reference to applicable telephone company tariffs is to be made as of the time of contracting (e.g., January 1, 1970). Since the telephone company tariffs, at that time, did not allow Western Union to interconnect its private line services with Bell's services for the purpose of providing its own FX and CCSA services, we conclude that Western Union may not obtain under the contracts, facilities which would be used in the provision of FX and CCSA services. Western Union may, of course, obtain such facilities pursuant to Bell tariffs on file with this Commission, in the same manner and at the same rates as other common carriers offering FX and CCSA type services.[12]

[12] Our interpretation of the contracts is further buttressed by the affidavits submitted by both parties in an attempt to explain each party's intentions at the time of contracting. AT&T affirmatively states that "[d]uring the negotiations, and in the execution of the contracts, it was not contemplated by those representing the Bell System that the contracts covered connection of Bell System services or facilities with Western Union services or facilities for FX or CCSA services, or that facilities would be furnished to Western Union under the contracts for such purposes." On the other hand, Western Union did not state that, at the time of negotiations, it was intended that facilities obtained under the contracts could be used for FX or CCSA services or any other Western Union services which required connection to Bell System services and which were not already allowed by tariffs in effect at the time of the signing. Rather Western Union merely states that at no time prior to the execution of the contracts did AT&T inform Western Union that the contracts did not cover leasing of Bell System facilities to Western Union for FX or CCSA services. Thus the intentions of the parties at the time of contracting, as shown by the affidavits of the parties, was that contract facilities could not be used for FX and CCSA services.

DOMESTIC SATELLITE INTERCONNECTION FACILITIES

17. We also have before us Western Union's Petition for Reconsideration of that portion of our Memorandum Opinion and Order of October 16, 1974, paragraphs 7-12, relating to use of contract facilities by Western Union to provide its domestic satellite services,[13] AT&T's Opposition thereto and Western Union's Reply to AT&T's Opposition. Western Union challenges our finding at paragraph 10 that it waived its right, if any existed, to use contract facilities to provide its domestic satellite services when we granted Western Union's domestic satellite authorization, *Western Union Authorization.*[14] Western Union claims generally that (a) the contracts permit it to use contract facilities in providing its domestic satellite services; (b) AT&T's duty to file tariffs did not authorize it to abrogate or ignore its contract obligation and; (c) the Western Union satellite license was not conditioned on a waiver by Western Union of its contract rights. In its responsive pleading AT&T argues, among other things, that provision of terrestrial access and interconnection facilities to Western Union under the Bell-Western Union exchange of facilities contracts is inconsistent with the terms of the contracts and would violate (a) the Commission's *Second Report and Order (Second Order)* in Docket No. 16495, 35 FCC 2d 844 (1972); (b) the Commission's December 22, 1972 *Memorandum Opinion and Order (Reconsideration Order)* in Docket No. 16495, 38 FCC 2d 665 and; (c) the Commission's *Memorandum Opinion, Order and Authorization (AT&T Authorization)* with respect to AT&T's domestic satellite application, released September 12, 1973, 42 FCC 2d 654. Moreover, AT&T claims that the provision of such facilities pursuant to tariff is fully consistent with the authority granted by the Commission to Western Union to construct and operate its domestic satellite system.[15]

[13] *Supra*, n. 1.

[14] *See Western Union Authorization*, 38 FCC 2d 1197 (1973).

[15] *Id.*

18. The essence of Western Union's position is that its domestic satellite authorization was not conditioned on a waiver of its contract rights because such condition was not drawn with sufficient clarity to apprise Western Union of any threat to the continuing validity of its facilities contracts with the Bell System if it accepted the authorization. Western Union's position is without merit when considered in the context of, among other things, the regulatory approach we have appropriately adopted and followed in domestic satellite communications in general, and in interconnection and access in particular. In our *Second Report and Reconsideration Orders* in Docket No. 16495, in which Western Union actively participated, we established our basic domestic satellite policy objectives, including our policy objective of having existing terrestrial carrier domestic satellite applicants (whether or not affiliated with the Bell System) provide interconnection and access arrangements at reasonable and non-discriminatory conditions to other domestic satellite carriers desiring to offer "retail" end-to-end services to their customers (*Second Report*, para. 34 and *Reconsideration Order*, paras. 83-84). Significantly, we recognized that the "initial implementation of domestic satellites does not confront [the Commission] with a normal or routine situation" and that "i[t] is also necessary to retain flexibility to alter our initial determinations in the light of changing circumstances" (*Second Report*, para. 15).[16] With respect to interconnection and access in particular we stated that "it [was] advisable to retain greater flexibility" and that "we [did] not expect to anticipate all conceivable situations" (*Second Report*, para. 34). Thus, we properly left open for future determination, namely, at such time as we considered specific intercon-

[16] Flexible regulation of domestic satellite communications is essential because of the unique nature of the technology and the extraordinary uncertainties and risks involved in developing viable domestic satellite systems. *Second Report*, para. 15.

nection and access proposals from applicants such as AT&T, the question of what *means* would be appropriate to assure realization of our interconnection and access policy objectives (*Second Report*, para. 33-34 and *Reconsideration Order*, paras. 83-84). We specifically stated that AT&T's proposals for interconnection with other carriers must be submitted for Commission approval prior to action on AT&T's domestic satellite applications and must meet our objective of assuring that "all carriers providing retail interstate satellite services (whether or not affiliated with Bell System Companies) have access at non-discriminatory terms and conditions to local loop and interexchange facilities as necessary for the purpose of originating and terminating such interstate services to their customers" (*Second Report*, para. 34). In summary, as a participant in Docket No. 16495, Western Union was on actual notice of: (a) the Commission's general policy objective on access and interconnection; (b) the regulatory approach adopted by the Commission to develop appropriate *means* to realize such policy objective and; (c) that as a potential domestic satellite licensee it would be subject to any interconnection and access policies adopted by the Commission pursuant to the *Second Report*.

19. It was in the context of the above-described regulatory scheme that we considered Western Union's and AT &T'S requests for domestic satellite authorization. As circumstances developed we considered Western Union's application some eight months before we considered AT&T's application, wherein we concluded as a matter of basic domestic satellite policy that tariffs, not private contracts, were the appropriate means to assure realization of our interconnection and access policy objectives (*AT&T Authorization*, 42 FCC 2d at 656-60). Contrary to the claim of Western Union, the mere circumstance that its authorization was considered and granted prior to AT&T's does not exempt Western Union from the applicability of our

access and interconnection determinations reached in conjunction with our consideration and granting of AT&T's authorization, to implement the general policies adopted in the *Second Report*. Nor does such circumstance have any bearing on whether Western Union voluntarily waived its contract rights, if any existed, when it accepted its authorization issued pursuant to the policies adopted in Docket No. 16495.

20. As set forth above, Western Union was on express notice from the *Second Report* that the basis on which AT&T would interconnect with other satellite carriers would be determined by the Commission in acting on AT&T's domestic satellite applications [17] and be binding on all other satellite applicants. The interconnection proposals submitted by AT&T in conjunction with its domestic satellite applications were subject to comment by interested persons, and although other various domestic satellite applicants took advantage of this opportunity Western Union did not file any comments (*AT&T Authorization*, 42 FCC 2d at 656). Nor did Western Union seek reconsideration or judicial review of the Commission's decision that the "filing of tariff schedules rather than the negotiation of private contracts is the most appropriate means by which to achieve our objective that these facilities shall be provided to other satellite carriers on 'reasonable and non-discriminatory conditions'" (*AT&T Authorization*, 42 FCC 2d at 659). Certainly, Western Union cannot claim that at that point it lacked knowledge of the express nature of the AT&T interconnection requirement.

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[17] Indeed, in granting Western Union's earth stations the Commission noted that basic interconnection policy would be determined in the context of AT&T's applications since "most domestic satellite applicants will be relying primarily on the local loop and interexchange facilities of the telephone companies for the purpose of originating and terminating services to their customers" (*Western Union Telegraph Co.*, 40 FCC 2d 1123, 1124).

21. Further, Western Union knowingly and willingly accepted its authorization subject to the condition that its "facilities shall be operated in accordance with all Commission policies adopted in Docket No. 16495 and all rules and policies subsequently made applicable to domestic satellite communications . . ." (*Western Union Authorization*, 38 FCC 2d at 1199). This condition is entirely consistent with the regulatory scheme set forth in our *Second Report* and *Reconsideration Order* as described above, which preceded the Western Union authorization and was embodied in that authorization, and is entirely consistent with the statutory scheme of the Communications Act. As to whether such condition placed Western Union on actual notice of the nature of the interconnection requirement we find it difficult to believe that as an established common carrier Western Union would not anticipate, either at the time of our *Second Report* and *Reconsideration Orders* or at the time its authorization was granted, that we might reach the determination after appropriate consideration of AT&T's applications and interconnection proposal that tariffs, rather than private contracts, would be the most appropriate means to assure the realization of our access and interconnection policy objectives which stressed the goal of "reasonable and non-discriminatory" interconnection. In light of the foregoing and Section 203 of the Communications Act, we deem Western Union's claim of lack of notice to be untenable. In any event, Western Union failed to challenge the AT&T grant, and is therefore now bound by that final decision. We conclude that Western Union willingly and knowingly accepted a condition in its domestic satellite authorization, as implemented by the unchallenged AT&T decision, which constituted a voluntary waiver of its contract rights, if any existed.

22. In view of our finding that Western Union knowingly and willingly waived its contract rights when it accepted its authorization, its further arguments that we unlawfully abrogated or modified its domestic satellite authorization or its contract rights are, if not rendered moot, clearly without merit. Our actions with respect to this matter, and the basis for such actions, have at all times been consistent with the statutory scheme set forth in the Communications Act, e.g., Sections 4(i), 4(j), 201, 203, 214, 307-309 (see also authority cited in the *Second Report*, 35 FCC 2d at 860). The condition we imposed on Western Union's authorization is reasonable and in our judgment serves the public convenience and necessity in assuring flexible regulation of domestic satellite communications and the provision of services and facilities on a reasonable and nondiscriminatory basis. Finally, even if Western Union had not waived its contract rights, as it did, for the reasons stated at paras. 13-16 above it still would not be able to use leased contract circuits or facilities to provide FX and CCSA services via its domestic satellite communications facilities.

23. Accordingly, IT IS ORDERED, That the leasing from Bell of interconnection facilities by Western Union to provide its FX and CCSA communications services and satellite communications services shall be only pursuant to tariffs filed with this Commission.[18]

24. IT IS FURTHER ORDERED, That Western Union's Petition for Reconsideration IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS,
Secretary.

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[18] This action is not to be interpreted as a ruling on the validity or merits of the presently filed Bell facility tariffs for other common carriers.

APPENDIX E

FCC 74-1092

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of
INTERCONNECTION FACILITIES FOR THE
WESTERN UNION TELEGRAPH CO.

MEMORANDUM OPINION AND ORDER

(Adopted October 9, 1974; Released October 16, 1974)

BY THE COMMISSION: COMMISSIONER LEE NOT PARTICIPATING; COMMISSIONER REID CONCURRING IN THE RESULT.

1. The Commission has before it complaints from Western Union Telegraph Company (hereinafter Western Union) against American Telephone and Telegraph Company and the Bell System Operating Companies (hereinafter Bell). A controversy exists between the parties as to (a) whether the Commission has required Bell to provide Western Union with interconnection facilities for its terrestrial or landline FX and CCSA services and, if so, whether contract or tariff rates apply thereto and (b) whether contract or tariff rates are applicable to interconnection facilities Western Union obtains for its domestic satellite service.

I. INTERCONNECTION FOR FX AND CCSA

2. On September 11, 1974 the *Bell System Tariff Offerings* Decision was affirmed. *The Bell Telephone Company of Pennsylvania* v. *FCC*, No. 74-1386, 3rd Cir.

Subsequently Bell in an apparent recognition of its obligations, has indicated its willingness to permit Western Union to interconnect with Bell facilities to provide Western Union's terrestrial FX and CCSA services. We reaffirm that such an obligation exists.

3. The Commission in the *Specialized Common Carrier Services* proceeding, 29 FCC 2d 870, reconsideration denied, 31 FCC 2d 1106 (1971) conducted a thorough investigation into the provision of private line services. As a result of that proceeding the Commission formulated a general policy of permitting the entry of new carriers in the specialized communications field. That policy required that all authorized carriers would have fair and equal access to the facilities necessary to terminate their authorized services. The Commission specifically stated that where a carrier had monopoly control over essential facilities it would not condone any policy or practice whereby such carrier would discriminate in favor of an affiliated carrier or among competitors.[1] 29 FCC 2d 870, 940.

4. To the extent that Western Union seeks to utilize facilities over which another carrier has a monopoly control, the policy is applicable to Western Union. Consistent with that view the Commission termed Western Union a specialized carrier in its *Bell System Tariff Offerings* proceeding, where Western Union and others were seeking to utilize facilities over which Bell had monopoly control. 46 FCC2d 413, 414 (1971). Thus Bell is obligated, pursuant to the Commission's Decision in *Specialized Common Carrier Services*, to make available, on a nondiscriminatory basis, its monopoly facilities to all carriers, including Western Union, for the provision of FX and CCSA services.

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[1] Compare *Final Report and Order* in Docket No. 18509, 21 FCC 2d 307, 324-325 (1970).

5. Bell and Western Union have entered into contracts which permit either party to lease certain facilities from the other. The Commission, without a hearing, is not empowered to modify or abrogate these contracts. See *United Gas Pipe Line Co.* v. *Mobile Gas Corp.* 350 U.S. 332 (1956) and *Federal Power Commission* v. *Sierra Pacific Power Co.* 350 U.S. 348 (1956). Docket 20099 will deal with *inter alia* the questions surrounding these contracts. Thus contract rates must be adhered to *pendente lite* if applicable to the facilities necessary for the provision of Western Union's FX and CCSA services. 46 FCC 2d 413. The remaining question is whether such contracts cover the necessary facilities. We deem it best to have the parties file briefs addressed specifically to that question before deciding whether the tariff rates or contract rates should apply to FX and CCSA. Accordingly, we request full briefings by all interested parties on this question.[2]

6. The Commission is cognizant that if the contract rates do apply a disparity in treatment among carriers will exist. Such a disparity, if unjustified, would be manifestly contradictory to the Commission's often enunciated policy of fair and full competition and its policy that tariffs, rather than contracts, should generally govern these matters. Because of this the Commission intends to strictly construe the Bell-Western Union contracts. Regardless of the outcome of this immediate proceeeding, the very important question of the disparity between the contract and tariff rates will be expeditiously considered in Docket 20099,[3] wherein we previously stated the Commission would consider whether the rates in the contracts or the tariffs are unreasonably high, unreasonably low,

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[2] All such briefs should be filed 10 working days from the release of this order. Reply briefs may be filed 5 working days after that.

[3] *American Telephone and Telegraph Co.*, FCC 74-690, released July 5, 1974. 47 FCC 2d 660.

or otherwise discriminatory and therefore unlawful in violation of Sections 201(b) and 202 of the Act. 46 FCC 2d 413, 434.

II. DOMESTIC SATELLITE FACILITIES

7. The issue raised in the area of domestic satellite facilities is whether the facilities necessary for such services be provided pursuant to the Bell-Western Union contracts or tariffs. Bell argues that the contracts do not apply to such facilities. Further Bell alleges that the provision of such facilities pursuant to contracts would be contrary to the Commission's policy of requiring that all carriers providing retail interstate satellite services have access to local loop and interexchange facilities at nondiscriminatory terms and conditions pursuant to tariffs. Western Union, on the other hand, alleges the applicability of the Bell-Western Union contracts to the leasing of such facilities.

8. In its *Second Report and Order*, 35 FCC 2d 844 (1972), the Commission adopted a policy favoring multiple entry and competition both as to satellite and terrestrial systems. We were concerned however that Bell's "economic strength and dominance stemming from its multi-billion dollar terrestrial investments and its permeating presence in all domestic communications markets" might have an impact on the chances of such policy succeeding. 35 FCC 2d 844, 847. Accordingly, the Commission in a further Domsat proceeding held that the domestic satellite authorizations would be withheld in the absence of a satisfactory showing that the necessary interconnection facilities would be offered in a reasonable and non-discriminatory manner. *Domestic Communications Satellite Facilities*, 38 FCC 2d 665, 698-99 (1972). Thus Bell's applications were specifically conditioned on it following the Commission's policies. *AT&T*,

42 FCC 2d 654 (1973). Bell willingly accepted the grant subject to the expressed conditions.

9. Western Union also sought authorization from the Commission to provide its own domestic satellite communications. These applications were also granted subject to the condition that the facilities would be operated in accordance with Commission policies adopted in the *Second Report and Order*, 35 FCC 2d 844 (1972), and "all rules and policies subsequently made applicable to domestic satellite communications. . . ." *Western Union Telegraph Co.*, 38 FCC 2d 1197, 1199 (1973). Western Union willingly accepted such a conditional grant.

10. Both Bell and Western Union willingly and knowingly accepted their domestic satellite authorizations subject to the explicit condition that tariffs, not private contracts, would be filed setting forth the charges, classifications, regulations and practices applicable to such facilities. *AT&T* 42 FCC 2d 654, 659 (1973), *Bell System Tariff Offerings*, 46 FCC 2d 413, 437. We held that such tariffs were "the most appropriate means by which to achieve our objective that these facilities [should] be provided to other satellite carriers on 'reasonable and nondiscriminatory conditions.'" *AT&T*, 42 FCC 2d 654, 659 (1973).[4] Bell and Western Union thus agreed to waive any rights, if any existed, to obtain such facilities by any means other than a tariff. Neither can now allege a right to such facilities under any contracts. "When an applicant accepts a government permit which is subject to certain conditions, he cannot later assert alleged rights which the permit required him to surrender in order to receive it." *Capital Telephone Company* v. *Fed-*

[4] This requirement was restated by the Commission in *Bell Systems Tariff Offerings*, 46 FCC 2d 413, 430 (1974). See also *Bell System Tariff Offerings*, FCC 74-955 released September 12, 1974. Neither party objected to such a requirement by petition for reconsideration.

eral Communications Commission, slip op. 11, No. 72-1715. D.C. Cir., May 24, 1974.

11. Accordingly, IT IS ORDERED, That the Bell System shall provide to Western Union interconnection facilities for its terrestrial FX and CCSA services.

12. IT IS FURTHER ORDERED, That the leasing from Bell of interconnection facilities by Western Union to provide domestic satellite communications service shall be only pursuant to tariffs filed with this Commission.[5]

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary*.

[5] The Commission's action should not be interpreted as a ruling on the validity or merits of the presently filed tariffs for domestic satellite communications.

APPENDIX F

AGREEMENT

between

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA

and

THE WESTERN UNION TELEGRAPH COMPANY

CONTRACT NO. 1

Covering the leasing of:

Circuits within exchange areas

Certain items of telephone equipment

Duct and pole line attachment space

Dated as of January 1, 1970

CONTRACT NO. 1

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THIS AGREEMENT, dated and effective as of the first day of January, 1970, made by and between THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA, a corporation of the State of West Virginia ("the Telephone Company"), and THE WESTERN UNION TELEGRAPH COMPANY, a corporation of the State of New York ("the Telegraph Company"),

WITNESSETH:

That in consideration of the mutual covenants and undertakings herein contained, the parties hereto covenant and agree as follows:

1. *Definitions*

(a) The word "circuit" means a path of electrical communication of one of the types described in Schedule A hereto attached, which is made a part hereof. Unless otherwise specifically provided herein, a circuit shall not extend beyond a single exchange area.

(b) The words "exchange area" and "interexchange", when used with respect to the Telephone Company or the Telegraph Company, shall have the meanings applied to them in the practices of the Telephone Company.

(c) The words "Bell System companies" mean the American Telephone and Telegraph Company and its principal operating telephone subsidiaries in the United States, and The Cincinnati and Suburban Bell Telephone Company and The Southern New England Telephone Company.

(d) The words "lessor" and "lessee" mean, respectively, with respect to any particular circuit or facility furnished hereunder (1) the party which furnishes, proposes to furnish, or is requested to furnish such circuit or facility, and (2) the party to which such circuit or

facility is furnished, proposed to be furnished, or requested to be furnished.

(e) The term "telephone order-receiving equipment" means an arrangement of equipment designed so that telephone circuits may be terminated but not interconnected. This equipment is furnished by the Telephone Company and is used by the Telegraph Company in connection with the forwarding of telegrams by telephone.

2. *General Undertaking of the Parties*

(a) Each party will lease to the other, upon reasonable notice in each case from the other party, and subject to all the provisions hereof, circuits and certain related facilities, to be operated by the lessee as part of or in connection with its plant or plant leased from lessor under other agreements in furnishing communication service to the public.

(b) Circuits and facilities furnished hereunder shall be subject to the conditions and for the charges specified in Schedules A, B, and C attached, which are made a part of this Agreement.

(c) The Telephone Company will furnish, install and maintain circuits for the use of the Telegraph Company, in any exchange area served by the Telephone Company, provided that in the judgment of the Telephone Company such circuits are available over and above the operating needs of the Telephone Company; where circuits are not so available, the Telephone Company will undertake as expeditiously as practicable, subject to construction charges as provided in item 6 of Schedule A, to construct such circuits for the use of the Telegraph Company, provided, however, that where construction by the Telephone Company would be required on non-Telephone Company facility routes to meet the needs of the Telegraph Company, additional circuits need not be provided other than

by special agreement. The Telephone Company may elect, but is not required, to furnish circuits hereunder to extend beyond the limits of an exchange area where the normal method of providing service would be from another exchange, or to connect different buildings on continuous property of the same customer. Nothing in this subsection (c) shall require the lessee to relinquish any circuit after it has once been established.

(d) The Telephone Company will furnish, install and maintain for the Telegraph Company's use the telephone equipment specified in Schedule B, for the purposes specified in this Agreement.

(e) The Telegraph Company will, to the extent that, in its judgment, it has facilities available, furnish, install and maintain circuits for the use of the Telephone Company.

(f) Each party will lease to the other duct in conduit systems and space for pole line attachments in such cases as the parties hereafter agree upon.

(g) This Agreement does not apply to the furnishing by either party to the other of any telephone or telegraph services or facilities under published tariffs.

3. *Circuits Leased to Telegraph Company*

(a) Purposes for Which Circuits Are Leased to the Telegraph Company

Except as otherwise provided in Section 4 hereof, covering circuits and equipment leased to the Telegraph Company for forwarding telegrams by telephone, circuits leased to the Telegraph Company hereunder may be used only in providing its common carrier communications services for which such circuits are suitable.

(b) Connection of Leased Circuits

Circuits leased to the Telegraph Company hereunder, or interexchange circuits of the Telegraph Company when connected to such leased circuits, may be directly connected with circuits owned by:

(1) Other telephone companies offering a general telephone service to the public within the continental United States,

(2) The United States Government on military bases, and on reservations of the National Aeronautics and Space Administration,

(3) Electric power, or oil, oil products, or natural gas pipeline companies, or railroad companies where the circuits of such companies are provided primarily to communicate with points located along a right-of-way owned or controlled by such company,

(4) Telegraph Companies offering international telegraph service under filed tariffs, where such circuits are used exclusively in international service and connection is made at terminals within the United States of such circuits,

(5) Telegraph or telephone companies, or government-operated telegraph or telephone systems, operating in countries bordering the continental United States, where such circuits are used exclusively in furnishing service between such countries and the continental United States, and connection is made at terminals within the United States of such circuits.

Any other direct connection of such circuits with circuits of others or of the Telephone Company shall be made only with the written approval of the Telephone Company.

(c) Termination of Leased Circuits in Terminal Equipment or Communications Systems of a Customer

(1) Circuits leased to the Telegraph Company hereunder, or circuits of the Telegraph Company when connected to such leased circuits, may be terminated in terminal equipment or communications systems provided by a customer of Western Union.

(2) When such circuits are terminated in customer-provided terminal equipment or customer-provided communications systems, the customer must procure a connecting arrangement from Western Union which Western Union hereby agrees to offer under its filed tariffs. The Telephone Company undertakes to supply Western Union such connecting arrangement as a part of the circuit leased to Western Union. The charge for such connecting arrangement shall be as specified in item 8 of Schedule A.

(3) Customer-provided terminal equipment and customer-provided communications systems which are connected to such circuits must meet criteria at least equal to the minimum protection criteria set forth in the tariffs of the Telephone Company covering the connection of customer-provided terminal equipment and customer-provided communications systems to the services of the Telephone Company. Lessee agrees that it will file tariff provisions setting forth the criteria for such connection.

Nothing in this subsection (c) shall, however, prohibit the continuance of existing direct terminating arrangements with authorized government agencies on military bases as covered by tariffs of the lessee.

(d) Connection of Western Union Private Line Services With Telephone Company Services

Connection of Western Union private line services with Telephone Company services shall be allowed only under the tariffs of the Telephone Company and consistent with the terms and conditions of such tariffs applicable to the connection of Western Union provided services with services of the Telephone Company. No such connection shall at any time be made in any jurisdiction except as duly authorized by tariffs in force and effect.

(e) Points Between Which Circuits Will Be Provided

(1) Circuits shall, by any combination of the lessor's facilities covered by Schedule A, extend only between the following points:

(i) Two offices of the lessee,

(ii) An office of the lessor and an office of the lessee,

(iii) An office of lessor and the premises of a customer of the lessee,

(iv) An office of the lessee and a telegraphically operated agency office of the lessee, or the premises of one or more of the lessee's customers,

(v) Premises of two or more customers of the lessee, or two or more premises of one customer of the lessee, or two or more locations on the premises of a customer of the lessee,

(vi) An interexchange circuit of the lessee from a point of connection on its pole line (or conduit or submarine cable) system or radio beam site, and an office of the lessee or an interexchange circuit of the lessee at another similar point of connection,

(vii) In special cases, by mutual agreement, between an office of the lessee and an outdoor site, or between two outdoor sites, in the same or a

nearby exchange, at which terminal equipment of the lessee is located.

(2) Circuits shall be furnished in their entirety by the lessor except that:

(i) Pairs or wires of either party in house cables or building conduit may be used to extend the pairs or wires of the other party.

(ii) Pairs or wires of either party between buildings of the same customer on continuous property may be used to extend the pairs or wires of the other party if the latter party elects not to furnish circuits for such purposes.

(iii) Wiring to terminal apparatus of the lessee shall be furnished by the lessee of the circuit from such points of termination of the lessor's wires, normally used by it, as may be designated by the lessor.

(f) Special Circuits

The obligation of the lessor in furnishing circuits pursuant to this Section 3 shall be limited to providing facilities of the general types normally employed in furnishing its public communications service. The Telephone Company may, however, if requested by lessee, furnish circuits with special characteristics, furnish telephone circuit terminal equipment located in a central office of the Telephone Company (or, at lessor's option, on the premises of its customer), or undertake other special measures, in order to make circuits furnished by the Telephone Company suitable for the purpose for which the Telegraph Company desires to use them, and in such cases charges as provided in item 7 of Schedule A shall apply.

(g) Circuits and facilities furnished pursuant to this Section 3 shall be upon the conditions and for the charges set forth in Schedule A.

4. *Circuits and Equipment Leased to Telegraph Company for Forwarding Telegrams by Telephone*

(a) Circuits leased to the Telegraph Company under this Section 4 may be used only for the purpose of forwarding telegrams by telephone and such circuits shall connect only:

(1) A telephone order-receiving equipment or telephone set in the Telegraph Company's office and

a private branch exchange or a telephone set in another office of the Telegraph Company, or

a private branch exchange or a telephone set on the premises of a customer of the Telegraph Company, or

a private branch exchange or telephone set on the premises of an authorized agent for the Telegraph Company, or

a coin box-equipped telephone set in a public location.

(2) A telephone set on the premises of an agent of the Telegraph Company and a private branch exchange or a telephone set on the premises of a customer of the Telegraph Company.

(b) Except as otherwise provided in this paragraph (b), any circuit furnished by the Telephone Company for the purposes specified in paragraph (a) of this Section 4 shall be furnished in its entirety by the Telephone Company and all equipment and equipment wiring connected to such circuit shall be furnished by the Telephone Company. Circuits of the Telegraph Company

used for forwarding telegrams by telephone, if not connected at either end to a private branch exchange or other terminal equipment at which circuits may be interconnected, may be connected to telephone order-receiving equipment in which circuits of the Telephone Company terminate. Circuits so provided by the Telegraph Company shall be terminated by the Telegraph Company within buildings at points designated by the Telephone Company, and any additional wiring required between such points of termination and the telephone equipment shall be furnished by the Telephone Company.

(c) The Telegraph Company shall not superpose any circuit upon, or subdivide, any circuit furnished to it for the purposes specified in paragraph (a) of this Section 4.

(d) Circuits furnished pursuant to this Section 4 shall be at the Telephone Company's tariff charges established from time to time for such circuits. All equipment and equipment wiring furnished by the Telephone Company pursuant to paragraph (b) of this Section 4 shall be furnished upon the conditions and for the charges set forth in Schedule B.

5. *Circuits Leased to Telephone Company*

(a) All circuits leased by the Telegraph Company to the Telephone Company may be used in the public communication business of the Telephone Company but not for the public message telegraph service. Circuits so leased shall be furnished in their entirety by the lessor with exceptions as to such leased circuits the same as contained in Section 3(e)(2) with respect to circuits leased to the Telegraph Company.

(b) Circuits furnished under this Section 5 shall be upon the conditions and for the charges set forth in Schedule A.

* * * *

11. *General Provisions*

(a) Circuits and facilities shall be furnished upon request of the lessee given for such period in advance as shall be reasonable under the particular circumstances. Except as otherwise provided herein or by special agreement, the period of rental of circuits and facilities furnished hereunder shall continue until termination thereof upon written notice by the lessee but not later than the termination of this Agreement as a whole.

(b) Circuits and facilities furnished under this Agreement shall be subject to a minimum charge equal to the charge for a period of one month. Except as provided in Section 8(f), upon discontinuance of a circuit or facility or a portion thereof after the first full month, the charge for the month in which the discontinuance occurred shall be prorated in proportion to the number of days during which the circuit or facility was furnished in such month, in accordance with the methods followed by the lessor for prorating charges for private line tariffed services.

(c) All charges shall be payable monthly, in accordance with established practices of the lessor or as specified in routines established pursuant to subsection (k) of this Section 11, upon statements rendered by the lessor. Either party will upon request furnish to the other such detailed information as may reasonably be required for verification of the billing statement.

(d) The lessor shall have the right at all times to substitute a circuit covered by a particular lettered paragraph of item 1 of Schedule A, or covered by item

2, 4, or 5 of Schedule A, for another circuit leased under the same paragraph or item; provided that in any case in which the charge for the circuit is based upon a specified gauge of wire, the gauge of wire of the substituted circuit shall not be smaller than the specified gauge.

(e) With respect to the furnishing of any particular circuit or facility hereunder, the obligations of the parties are subject to the condition that all necessary authorizations or approvals of public authorities for such action shall be secured. However, inability to secure the necessary authorization or approval for any particular circuit or facility shall not be held to make this Agreement as a whole impossible of performance or authorize either party to terminate it.

(f) Circuits and facilities furnished hereunder shall not be used for any purpose or in any manner directly or indirectly in violation of law or in aid of any unlawful act or undertaking. The lessor shall be entitled to rely and act upon advice received from law enforcement agencies that there is reasonable cause to believe that a circuit or facility is being used in violation of law.

(g) The lessor may immediately terminate the use by the lessee of any circuit or facility furnished hereunder which is used in violation of this Agreement.

(h) All obligations of the parties hereunder are subject to the requirements of the Government for war purposes.

(i) The failure of either party hereto to enforce any of the provisions of this Agreement or the waiver thereof in any instance shall not be construed as a general waiver or relinquishment on its part of any such provision, but the same shall, nevertheless, be and remain in full force and effect.

(j) Neither this Agreement nor any rights hereunder nor any circuits procured hereunder may be assigned, transferred, or sublet by either party without the written consent of the other, except that the use of particular circuits may be made available without consent (i) to customers of the Telegraph Company to the extent provided in Section 3 hereof, and (ii) to customers of the Telephone Company to the extent permitted by Section 5.

(k) The parties hereto will cooperate in the preparation of, and will adopt, routines to assist in administering and applying this Agreement, which routines may be modified or superseded as may be provided therein or by mutual consent. With respect to matters not specifically covered by this Agreement or such routines, the administration of this Agreement shall be subject to the lessor's practices from time to time established, not inconsistent herewith.

(l) This Agreement may be terminated by either party upon five years' written notice to the other party.

(m) The Agreement between the parties hereto dated August 1, 1946, known as Contract No. 1, and all amendments and supplements thereto, are hereby terminated except with respect to any obligations to make payments already accrued thereunder; the rights and liabilities of the parties with respect to any circuits or facilities of the kind covered by this present Agreement now furnished by either party to the other shall henceforth be determined and governed by the provisions of this present Agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement in duplicate as of the day and year first written above.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA,

[SEAL]

W. L. LINDHOLM
President.

D. R. L.
F. M. S.
W. E. F.

ATTEST:

J. W. BOYKIN
Assistant Secretary.

THE WESTERN UNION TELEGRAPH COMPANY,

[SEAL]

D. HARMON
Vice President.

ATTEST:

E. M. HARKER
Assistant Secretary.

• • • •

APPENDIX G

AGREEMENT

between

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA

and

THE WESTERN UNION TELEGRAPH COMPANY

Contract No. 2

Covering the leasing of circuits between exchange areas

Dated as of January 1, 1970

CONTRACT NO. 2

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THIS AGREEMENT, dated and effective as of the first day of January, 1970, made by and between THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA, a corporation of the State of West Virginia ("the Telephone Company"), and THE WESTERN UNION TELEGRAPH COMPANY, a corporation of the State of New York ("the Telegraph Company"),

WITNESSETH:

That in consideration of the mutual covenants and undertakings herein contained, the parties hereto covenant and agree as follows:

1. *Definitions*

(a) The word "circuit" except in the phrase "local terminal circuit" means a path of electrical communication of one of the types described in Schedule A hereto attached, which is made a part hereof.

(b) The words "circuit section" mean a circuit extending between two principal central offices of the Telephone Company in different exchange areas at which central offices interexchange circuits of the Telephone Company terminate, or a circuit extending between two principal offices of the Telegraph Company in different exchange areas at which offices interexchange circuits of the Telegraph Company terminate. If the exchange area contains more than one such office, the lessor may designate which is the principal one for the purposes hereof.

(c) The words "exchange area" and "interexchange", when used with respect to the Telephone Company or the Telegraph Company, shall have the meanings applied to them in the practices of the Telephone Company.

(d) The words "Bell System Companies" mean the American Telephone and Telegraph Company and its

principal operating telephone subsidiaries in the United States, and The Cincinnati and Suburban Bell Telephone Company and The Southern New England Telephone Company.

(e) The words "lessor" and "lessee" mean, respectively, with respect to any particular circuit section or related facility furnished hereunder, (1) the party which furnishes, proposes to furnish, or is requested to furnish such circuit section or related facility, and (2) the party to which such circuit section or related facility is furnished, proposed to be furnished, or requested to be furnished.

2. *General Undertaking of the Parties*

(a) Each party will lease to the other, upon reasonable notice in each case from the other party, and subject to all the provisions hereof, circuits and certain related facilities, to be operated by lessee as a part of or in connection with its plant, or plant leased from lessor under other agreements, in furnishing communication service to the public. Circuits shall be furnished hereunder only in the form of two-point circuit sections.

(b) Circuits and related facilities furnished hereunder shall be subject to the conditions and for the charges specified in Schedule A.

(c) In the case of a circuit section of one of the types described in item (a) of Schedule A, the lessor will provide all equipment located in or between its own offices required to make available the particular type of circuit section requested by the lessee, and the lessee will provide all other equipment required to be associated with such circuit section. In the case of a circuit section of the type described in item (c) of Schedule A, the lessor will provide all equipment located in or between its own offices required for a completely operative circuit.

(d) Access and connection to a circuit section furnished hereunder may be had at points of termination of such circuit section only by means of local terminal circuits procured from the lessor or from its connecting telephone company by separate agreement, or by connections made by the lessee upon special approval by the lessor.

(e) The obligation of each party to lease circuits to the other (except under emergency conditions as specified in Section 5 hereof) is limited as follows:

(1) No direct current telegraph circuits of the type specified in item (b) of Schedule A, except those currently under lease hereunder will be furnished. Circuits of such type under lease hereunder will be furnished, subject to the provisions hereof, until the lessee shall terminate the lease of any such circuit upon written notice to the lessor, or the lessor shall terminate the lease of any such circuit upon not less than three months' prior written notice to the lessee specifying the date of such termination. Such circuit will not be furnished after the date of termination specified in such notice by the lessee or the lessor, as the case may be. Any such circuit so terminated upon notification by the lessor will be replaced by a circuit of the type specified in item (c) or item (d) of Schedule A and at the rental provided for therein.

(2) With respect to all other types of circuits:

(i) Over routes where the operating needs do not require all the lessor's available circuits of the desired type on the route, circuits will be furnished on demand.

(ii) Over routes where all the lessor's available circuits of the desired type are required by the

operating needs, the lessor will undertake as expeditiously as practicable at its own expense to provide additional circuits to meet the combined additional requirements of itself and the lessee, except that where additional construction by the lessor would be required to meet the needs of the lessee, additional circuits need not be provided (otherwise than by special agreement), if in the judgment of the lessor the requirements of the lessee for plant construction are in excess of the probable requirements of the lessor's own business over the route for a reasonable period in the future.

(iii) Where, at the request of lessee, lessor furnishes circuits with special characteristics, furnishes telephone circuit terminal equipment, or undertakes other special measures, in order to make circuits furnished by lessor suitable for the purpose for which lessee desires to use them under this Agreement, lessee shall reimburse lessor therefor, as provided in item (f) of Schedule A.

(3) The lessor shall not in any case be required to provide a circuit section to any point or into any territory not served by its existing lines, except that the Telephone Company will furnish over lines of itself and other Bell System Companies and the Telegraph Company will furnish over lines of itself, its subsidiary and affiliated companies (subject to the limitations on furnishing circuits herein applying to all companies involved) any circuit section required to reach points on the lines of such other companies, in accordance with arrangements existing among each group of companies from time to time. Except as specified in paragraph (1) of this subsection (e), nothing in this subsection shall require the lessee to relinquish any circuit after it has once been established.

(f) This Agreement does not apply to the furnishing by either party to the other of any telephone or telegraph services or facilities under published tariffs.

3. *Circuits Leased to the Telegraph Company*

(a) Purposes for Which Circuits Are Leased to the Telegraph Company

Circuits leased to the Telegraph Company hereunder may be used only in providing its common carrier communications services for which such circuits are suitable.

(b) Connection of Leased Circuits

Circuits leased to the Telegraph Company hereunder, or interexchange circuits of the Telegraph Company when connected to such leased circuits, may be directly connected with circuits owned by:

(1) Other telephone companies offering a general telephone service to the public within the continental United States,

(2) The United States Government on military bases, and on reservations of the National Aeronautics and Space Administration,

(3) Electric power, or oil, oil products, or natural gas pipeline companies, or railroad companies where the circuits of such companies are provided primarily to communicate with points located along a rignt-of-way owned or controlled by such company,

(4) Telegraph companies offering international telegraph service under filed tariffs, where such circuits are used exclusively in international service

and connection is made at terminals within the United States of such circuits,

(5) Telegraph or telephone companies, or government-operated telegraph or telephone systems, operating in countries bordering the continental United States, where such circuits are used exclusively in furnishing service between such countries and the continental United States, and connection is made at terminals within the United States of such circuits.

Any other direct connection of such circuits with circuits of other or of the Telephone Company shall be made only with the written approval of the Telephone Company.

(c) Termination of Leased Circuits in Terminal Equipment or Communication Systems of a Customer

(1) Circuits leased to the Telegraph Company hereunder, and interexchange circuits of the Telegraph Company when connected to such leased circuits, may be terminated through suitable connecting circuits (described in Section 2(d)) in terminal equipment or communications systems provided by a customer of Western Union.

(2) When such circuits are connected to circuits which are terminated in customer-provided terminal equipment or customer-provided communications systems, the customer must procure a connecting arrangement from Western Union which Western Union hereby agrees to offer under its filed tariffs. The Telephone Company undertakes to supply Western Union such connecting arrangement as a part of the circuit leased to Western Union. The charge for such connecting arrangement shall be as specified in item (g) of Schedule A.

(3) Customer-provided terminal equipment and customer-provided communications systems which are connected to such circuits must meet criteria at least equal to the minimum protection criteria set forth in the tariffs of the Telephone Company covering the connection of customer-provided terminal equipment and customer-provided communications systems to the services of the Telephone Company. Lessee agrees that it will file tariff provisions setting forth the criteria for such connections.

Nothing in this subsection (c) shall, however, prohibit the continuance of existing direct terminating arrangements with authorized government agencies on military bases as covered by tariffs of the lessee.

4. *Circuits Leased to the Telephone Company*

Circuits leased to the Telephone Company may be used in the public communication business of the Telephone Company but not for public message telegraph service.

* * * *

9. *General Provisions*

(a) Circuits and facilities shall be furnished upon written request of the lessee given for such period in advance as shall be reasonable under the particular circumstances. Except as otherwise provided herein or by special agreement, the period of rental of circuits and facilities furnished hereunder shall continue until termination thereof upon written notice by the lessee but not later than the termination of this Agreement as a whole.

(b) In all cases where circuits and facilities could be furnished either by the Telephone Company under this Agreement or by another Bell System Company under an agreement similiar to this Agreement, the Bell System

Companies involved shall determine which company shall furnish the circuit section.

(c) Except as otherwise provided in item (e) of Schedule A, circuits and facilities shall be furnished subject to a minimum charge equal to the charge for a period of one month. Upon discontinuance after the first full month, the charge for the month in which the discontinuance occurred shall be prorated in proportion to the number of days during which the circuit section was furnished in such month, in accordance with the methods followed by the lessor for prorating charges for private line services.

(d) All charges shall be payable monthly, in accordance with established practices of the lessor or as specified in routines established pursuant to subsection (1) of this Section 9, upon statements rendered by the lessor. Either party will upon request furnish to the other such detailed information as may reasonably be required for verification of the billing statement.

(e) The lessor shall have the right at all times to substitute a circuit section covered by a particular lettered paragraph of Schedule A for another circuit section leased under the same lettered paragraph.

(f) With respect to the furnishing of any particular circuit or facility hereunder, the obligations of the parties are subject to the conditions that all necessary authorizations or approvals of public authorities for such action shall be secured. However, inability to secure the necessary authorization or approval for any particular circuit or facility shall not be held to make this Agreement as a whole impossible of performance or authorize either party to terminate it.

(g) Circuits and facilities furnished hereunder shall not be used for any purpose or in any manner directly or

indirectly in violation of law or in aid of any unlawful act or undertaking. The lessor shall be entitled to rely and act upon advice received from law enforcement agencies that there is reasonable cause to belive that a circuit is being used in violation of law.

(h) The lessor may immediately terminate the use by the lessee of any circuit or facility which is used in violation of this Agreement.

(i) All obligations of the parties hereunder are subject to the requirements of the Government for war purposes.

(j) The failure of either party hereto to enforce any of the provisions of this Agreement or the waiver thereof in any instance shall not be construed as a general waiver or relinquishment on its part of any such provision, but the same shall, nevertheless, be and remain in full force and effect.

(k) Neither this Agreement nor any rights hereunder nor any circuits procured hereunder may be assigned, transferred, or sublet by either party without the written consent of the other, except that the use of particular circuits may be made available without consent (i) to customers of the Telegraph Company to the extent provided in Section 3 hereof, and (ii) to customers of the Telephone Company to the extent permitted by Section 4 hereof.

(l) The parties hereto will cooperate in the preparation of, and will adopt, routines to assist in administering and applying this Agreement, which routines may be modified or superseded as may be provided therein or by mutual consent. With respect to matters not specifically covered by this Agreement or such routines, the administration of this Agreement shall be subject to the lessor's practices from time to time established, not inconsistent herewith.

(m) This Agreement may be terminated by either party upon five years' written notice to the other party.

(n) The agreement between the parties hereto, dated August 1, 1946, known as Contract No. 2, and all amendments and supplements thereto, are hereby terminated, except with respect to any obligations to make payments already accrued thereunder; the rights and liabilities of the parties with respect to any circuits of the kind covered by this present Agreement now furnished by either party to the other shall henceforth be determined and governed by the provisions of this present Agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement in duplicate as of the day and year first written above.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA,

[SEAL]

W. L. LINDHOLM
President.

D. L. R.
F. M. S.
W. E. F.

ATTEST:

J. W. BOYKIN
Assistant Secretary.

THE WESTERN UNION TELEGRAPH COMPANY,

[SEAL]

D. HARMON
Vice President.

ATTEST:

E. M. HARKER
Assistant Secretary.

* * * *

APPENDIX H

RELEVANT STATUTORY PROVISIONS

Administrative Procedure Act

Section 10(e), 5 U.S.C. § 706, provides:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Communications Act of 1934

Section 4(i), 47 U.S.C. § 154(i), provides:

The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.

Section 202(a), 47 U.S.C. § 202(a), provides:

(a) It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

Section 203, *as amended*, 47 U.S.C. § 203, provides:

(a) Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this chapter when a through route has been established, whether such charges are joint or

separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

(b)(1) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after ninety days notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe.

(2) The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions except that the Commission may not require the notice period specified in paragraph (1) to be more than ninety days.

(c) No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any

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privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

(d) The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(e) In case of failure or refusal on the part of any carrier to comply with the provisions of this section or of any regulation or order made by the Commission thereunder, such carrier shall forfeit to the United States the sum of $500 for each such offense and $25 for each and every day of the continuance of such offense.

Section 204, *as amended*, 47 U.S.C. § 204, provides:

(a) Whenever there is filed with the Commission any new or revised charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission, upon delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such charge, classification, regulation, or practice, in whole or in part but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearing the Commission may make such order with reference thereto as would be proper in a proceeding initiated after such charge, classification, regulation, or practice had become effective. If the proceeding has not been concluded and an order made within the period of the suspension, the proposed new or revised charge, classification, regulation, or practice shall go into

effect at the end of such period; but in case of a proposed charge for a new service or an increased charge, the Commission may by order require the interested carrier or carriers to keep accurate account of all amounts received by reason of such charge for a new service or increased charge, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such charge for a new service or increased charges as by its decision shall be found not justified. At any hearing involving a charge increased, or sought to be increased, the burden of proof to show that the increased charge, or proposed charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

(b) Notwithstanding the provisions of subsection (a) of this section, the Commission may allow part of a charge, classification, regulation, or practice to go into effect, based upon a written showing by the carrier or carriers affected, and an opportunity for written comment thereon by affected persons, that such partial authorization is just, fair, and reasonable. Additionally, or in combination with a partial authorization, the Commission, upon a similar showing, may allow all or part of a charge, classification, regulation, or practice to go into effect on a temporary basis pending further order of the Commission. Authorizations of temporary new or increased charges may include an accounting order of the type provided for in subsection (a).

Section 205(a), 47 U.S.C. § 205(a), provides:

> (a) Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

Section 211(a), 47 U.S.C. § 211(a), provides:

> (a) Every carrier subject to this chapter shall file with the Commission copies of all contracts, agreements, or arrangements with other carriers, or with common carriers not subject to the provisions of this chapter, in relation to any traffic affected by the provisions of this chapter to which it may be a party.

Section 303(r), *as amended*, 47 U.S.C. § 303(r), provides:

> Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

> (r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

Supreme Court, U. S.
FILED
JAN 6 1977
MICHAEL RODAK, JR., CLERK

No. 76-683

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

THE WESTERN UNION TELEGRAPH COMPANY, *Petitioner*,

v.

FEDERAL COMMUNICATIONS COMMISSION, UNITED STATES OF AMERICA, AMERICAN TELEPHONE AND TELEGRAPH COMPANY, and the BELL SYSTEM OPERATING COMPANIES, *Respondents*.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Respondents, American Telephone and Telegraph Company ("AT&T") and the Bell System Operating Companies herein oppose the petition for a writ of certiorari filed by The Western Union Telegraph Company ("Western Union") on November 15, 1976.

QUESTION PRESENTED [1]

Whether the Court of Appeals erred in refusing to overturn the decision of the Federal Communications Commission ("FCC") (1) that under contracts between the Bell System and Western Union which will expire in 1978 Western Union may not lease facilities from the Bell System for Western Union's use in providing FX and CCSA services; and (2) that Western Union must instead obtain those facilities pursuant to tariffs under the same rates, terms and conditions as other carriers with whom it competes?

STATEMENT OF THE CASE

In 1970, Western Union and the Bell System renewed and modified long-standing contracts pursuant to which Western Union leases facilities for its use in rendering service to the public. Those contracts will expire in 1978. Until that time, Western Union desires to obtain facilities for its provision of so-called

[1] In its petition, Western Union sets forth a single question presented dealing solely with the lower court's review of the FCC's construction of the Bell System-Western Union contracts. However, Western Union claims in a footnote (p. 3 n. 4) that the question presented "is also applicable to the Commission's holding that Western Union waived its contract rights by accepting a domestic satellite grant." The Bell System does not concede that Western Union has properly sought certiorari with respect to the waiver issue by its footnote reference to this quite different question. Indeed, Western Union's argument as to the construction of the Bell System-Western Union contracts turns upon a supposed distinction between the deference due an administrative agency's construction of a contract and its resolution of other issues, such as the interpretation of its prior orders, which was the basis for the FCC's resolution of the waiver issue. In any event, the argument which the Bell System will advance concerning the contract construction issue applies, as the lower court held (Petn. 17a), *a fortiori* to the waiver issue.

FX and CCSA services [2] from the Bell System under the 1970 contracts, rather than pursuant to tariffs which the Bell System was ordered to file by the FCC and which set forth the rates that other carriers, including many of Western Union's competitors, must pay for their FX/CCSA facilities.

The present dispute has its origin in a series of FCC orders post-dating the 1970 agreements, which have substantially changed the nature of the domestic communications industry. In a major departure from prior regulatory policy and practice, the FCC in 1971 determined to authorize so-called "Specialized Common Carriers" ("SCCs") to engage in the provision of interstate common carrier private line service in competition with the Bell System and Western Union.[3]

In commencing operations, the SCCs provided only "point-to-point" (*i.e.* non-switched) private line service and required from the Bell System solely the local distribution facilities necessary to originate or terminate that service. Thus, at this stage of their operations the SCCs neither required nor sought connection with the Bell System's switched telephone network.

Later, however, some of the SCCs began demanding the right to offer FX and CCSA services. Although previously providing the SCCs with facilities necessary for their point-to-point services, the Bell System took the position that connection of the SCCs

[2] Western Union does not challenge the lower court's description (Petn. 4a n.1) of FX and CCSA services. See Petn. 5 n.7.

[3] *See* Specialized Common Carrier Services, 29 F.C.C.2d 870, *reconsideration denied*, 31 F.C.C.2d 1106 (1971), *aff'd*, Washington UTC v. FCC, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975).

with the switched public telephone network for switched services, such as FX and CCSA, would interfere with the planning and coordination necessary to insure efficient service via that network and would increase the costs associated with its operation.

Ultimately, the issue of SCC provision of FX and CCSA services via Bell facilities and through connection with Bell's switched public telephone network was resolved by the FCC, which on April 23, 1974, ruled that the Bell System should interconnect with the SCCs for their provision of FX and CCSA services. (46 F.C.C.2d 413). To implement this requirement, the FCC directed that the Bell System file interstate tariffs setting forth a schedule of charges for its provision of FX/CCSA facilities to other carriers and for its interconnection with them.

Up to this point in time, Western Union had not provided nor sought to provide FX/CCSA services. It had not sought to lease facilities from the Bell System under the 1970 (or earlier) contracts for this purpose, nor had it indicated a desire to interconnect with Bell switched services.

However, after the Bell System sought judicial review of the FCC's April 23, 1974, order, Western Union began to assert its right to provide FX and CCSA services. Subsequently, it registered an informal complaint with the FCC concerning the Bell System's refusal both to provide connections and to allow Western Union to lease facilities under the 1970 contracts for its provision of these services. (A. 23).

Prior to the FCC's ruling upon this complaint, its earlier order was affirmed. *Bell Telephone Co.* v. *FCC,* 503 F.2d 1250 (3d Cir. 1974), *cert. denied,* 422

U.S. 1026 (1975). Since that decision rested upon a rationale which was broad enough to mandate the Bell System's provision of FX/CCSA interconnections and facilities to Western Union and not merely the new SCCs, the Bell System agreed to permit Western Union to obtain facilities and to connect its services with Bell System switched services in the manner necessary to allow Western Union to provide FX and CCSA services. However, the Bell System took the position that Western Union must pay for these interconnections and facilities under the same tariffed rates applicable to the SCCs, rather than under the lower rates for facilities contained in the 1970 contracts, arguing that those contracts did not extend to Western Union's provision of FX/CCSA services.

On October 16, 1974, the FCC, acting on Western Union's complaint, handed down an order which recognized and affirmed that the Bell System was required by the April 23, 1974, order to provide facilities and to connect with Western Union to enable it to provide FX and CCSA services. (Petn. 64a). Declaring that for certain purposes Western Union was an SCC within the meaning of its earlier orders, the FCC held that

> "Thus Bell is obligated, pursuant to the Commission's Decision in *Specialized Common Carrier Services* [29 F.C.C.2d 870, 31 F.C.C.2d 1106 (1971)], to make available, on a non-discriminatory basis, its monopoly facilities to all carriers, including Western Union, for the provision of FX and CCSA services." (Petn. 65a).

The FCC was unable on the record then before it, however, to determine whether the rates for the facilities involved in providing FX and CCSA services

should be determined by the 1970 Bell System-Western Union contracts or whether the charges for such facilities should instead be determined by Bell's tariffs. Accordingly, the FCC directed the parties to brief this question.

Following the submission of copious briefs by both sides (A. 47, 65, 124, 137) bearing on construction of the 1970 contracts, the FCC on June 24, 1975, issued the final order underlying Western Union's instant petition. (Petn. 45a). After discussing the terms of the Bell System-Western Union contracts and other evidence bearing upon the intent of the parties, the FCC found that "Western Union may not obtain under the contracts facilities which would be used in the provision of FX and CCSA services," but instead must obtain such facilities "pursuant to Bell tariffs on file with this Commission, in the same manner and at the same rates as other common carriers offering FX and CCSA type services." (Petn. 57a).[4]

Unsatisfied with the decision (which Western Union's own complaint had precipitated) that it must pay the same tariff rates as other carriers for FX/CCSA facilities, Western Union filed a petition for review in the Third Circuit. In briefing and arguing the case, Western Union contended, in the lower court's words, that the FCC had "no particular expertise" with respect to the issue involved in the con-

[4] As to the facilities used in the provision of domestic satellite services, the FCC analyzed its prior orders and reaffirmed that "Western Union willingly and knowingly waived its contract rights [if any existed] when it accepted its authorization" for its own domestic satellite facilities. (Petn. 63a). Thus, here, too, Western Union was required to obtain facilities pursuant to Bell tariffs on file at the FCC rather than at preferential contract rates.

struction of the Bell System-Western Union contracts and that its decision was, therefore, "entitled to no greater deference from [that] court than would be due a district court in a breach of contract action." (Petn. 11a).

After analyzing the relevant sections of the Administrative Procedure Act and recognizing that "[t]hese agreements involve complex, sophisticated, and rapidly-evolving communications technology * * * * implicat[ing] questions of national regulatory policy" (Petn. 11a-12a), the Third Circuit rejected Western Union's argument and held that it would upset the FCC's construction of the contracts "only if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." (Petn. 12a). Then turning to an analysis of the several provisions of the contracts, the Court of Appeals refused to adopt Western Union's construction and concluded that the FCC's rejection of Western Union's position should not be set aside under the standard of review prescribed by the Administrative Procedure Act.

The petition for certiorari filed by Western Union in this Court complains that the Third Circuit did not review *de novo* the contractual issue decided by the FCC. It also seeks to have this Court so construe the contracts and render a decision which would enable Western Union to have the advantage until 1978 of contract, as opposed to tariff, rates for the lease of facilities used in its provision of FX and CCSA services. *See* Petn. p. 13 n.18.[5]

[5] Western Union in its petition relies heavily upon the dissenting opinion of Judge Garth below, which, based upon a *de novo* review of the issues decided by the FCC, concluded that the contracts

(footnote continued)

REASONS FOR OPPOSING THE WRIT

Western Union has failed to advance anything in its petition that would justify the exercise of this Court's certiorari jurisdiction. Certainly, the inherent significance of the dispute between Western Union and the Bell System and any attending considerations of equity are not such as to prompt this Court to grant review. The disputed contracts will terminate in 1978. Moreover, what Western Union has unsuccessfully sought from both the FCC and the Third Circuit is a construction of the contracts that would put it in a preferred position, vis-a-vis other carriers, in obtaining facilities from the Bell System for the provision of FX and CCSA services.

Just as the Bell System-Western Union dispute fails to raise any significant issues of national policy, it similarly fails to raise any legal issues commonly

did extend to Western Union's provision of FX and CCSA services. Because of the inappropriateness of this Court's exercise of its certiorari jurisdiction to resolve this issue, we will do no more here than point out that Judge Garth failed even to recognize many of the principal arguments advanced in support of the FCC's construction of the contracts—(1) that in 1970, when the contracts were renewed, Western Union was explicitly precluded from providing FX services by Bell System tariffs then in effect (A.61); (2) that the Bell System did not interconnect its switched services, such as are used in the provision of FX and CCSA services, with non-telephone communications common carriers, like Western Union, until the FCC's 1974 order; (3) that under Section 2(g) of one of the 1970 contracts (Petn. 74a) and Section 2(f) of the other 1970 contract (Petn. 91a), Western Union is prohibited from leasing facilities where they are available under tariff; and (4) that under Section 3(b) of the agreements (Petn. 75a, 91-92a) Western Union would require the written consent of the Bell System (which it neither sought nor obtained) to interconnect circuits in the manner necessary for the provision of FX and CCSA services and thus could not claim an open-ended obligation from the Bell System to make facilities available for FX/CCSA services.

recognized as a prerequisite to the exercise of this Court's certiorari jurisdiction. Instead, the position taken by Western Union in this Court rests solely upon its reading of the record of the proceedings underlying the FCC's June 24, 1975, order.

Western Union does not and cannot claim that no deference should ever be paid to an administrative agency's construction of a contract properly brought before it. A long line of judicial authority, both in this and in other courts, which mandates judicial deference to administrative agency adjudication of contract disputes,[6] as well as elementary precepts of primary jurisdiction,[7] prevent Western Union from taking any such broad legal position.

[6] United Gas Pipe Line Co. v. Memphis Light, Gas and Water Div., 358 U.S. 103, 114 (1958) (recognition of FPC's "special competence" in construing contract); Gunther v. San Diego & Arizona E. Ry., 382 U.S. 257 (1965) (deference due decisions of National Railway Adjustment Board which bring to "thorny problems" of contract construction expertise based upon knowledge of "the industry's language, customs, and practices"); NLRB v. Marcus Trucking Co., 286 F.2d 583 (2d Cir. 1961) (deference paid to NLRB's conclusion that a contract existed between the parties, notwithstanding the court's conclusion that evidence for the contract was "synthetic"); North Atlantic Westbound Freight Ass'n v. FMC, 397 F.2d 683, 685 (D.C. Cir. 1968) ("[c]ertainly where underlying issues of fact or policy are involved an agency's interpretation of agreements is due judicial respect and deference"); St. Petersburg Bank & Trust Co. v. Boutin, 445 F.2d 1028, 1033 (5th Cir. 1971) (deference paid to SBA's construction of ambiguous provision of a loan agreement).

[7] *See, e.g.*, Far East Conference v. United States, 342 U.S. 570, 574 (1952); Mississippi Power & Light Co. v. United Gas Pipe Line Co., 532 F.2d 412 (5th Cir. 1976) (recognizing the primary jurisdiction of the FPC to construe a contract between a pipeline company and one of its customers in the light of the FPC's general regulatory authority over and involvement in the natural

Instead, disagreeing with the lower court's assessment that the Bell System-Western Union agreements "involve complex, sophisticated, and rapidly-evolving communications technology" (Petn. 11a), Western Union contends that the issue before the FCC involved "a simple question of the interpretation of written agreements" (Petn. 8) and that "[n]o factors derived from FCC 'expertise' played any part whatsoever in the agency decision." (Petn. 9). Although its entire petition rests upon this proposition, Western Union relies upon nothing other than the force of its own assertions to establish this element of its argument.

Certainly, the FCC did not here "disavow . . . reliance on any special agency competence or expertise and profess . . . instead to be acting as would a court . . . " (Petn. 10), like the agencies whose orders were under review in the two decisions of this Court relied upon by Western Union in its petition. In *Texas Gas Transmission Corp.* v. *Shell Oil Co.*, 363 U.S. 263, 268 (1960), this Court was able to hold that

> "the record nowhere discloses that the Commission arrived at its interpretation of the [contract] . . . on the basis of specialized knowledge gained from experience in the regulation of the natural gas business . . . ."

There, the contract issue arose in a routine rate-making case in which the hearing examiner "concluded that

gas curtailment issues which gave rise to the contract dispute). Significantly, Western Union in its petition here does not quarrel with the Third Circuit's observation that, had Western Union not chosen the FCC as the forum to resolve its contract dispute with the Bell System and had it instead proceeded directly to federal district court, its action probably would have been referred to the FCC under the doctrine of primary jurisdiction. (Petn. 11a n.7).

'elemental principles of contract law . . . too commonly known to the legal profession to require citation in support thereof' compelled the decision he reached." (*Id.* at 269).

Similarly, in *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87 (1943), the SEC had explicitly "stated that it was merely applying 'the broad equitable principles enunciated' " in judicial precedents. This Court was thus able to hold that the SEC "purported to be acting only as it assumed a court of equity would have acted in a similar case." (*Id.*) In *Texas Gas, Chenery* and similar cases, where the agency has made clear by its action and its words that it is relying only upon general legal principles and that it is not in any better position than a court to articulate those principles, it may well be appropriate that a court review the agency's decision in the same manner that it would review the judgment of a trial court.[8]

This unexceptionable proposition, however, hardly supports the position which Western Union has taken in this case. As was recognized by both the lower court (Petn. 5a-6a) and by the FCC (Petn. 64a-67a; 45a-

[8] To be sure, the FCC did not explicitly refer to or discuss the expertise which it could bring to the resolution of the Western Union-Bell System contract dispute. But regulatory agencies seldom proclaim their own expertise in dealing with issues properly brought before them, yet courts regularly presume that it his been exercised absent express indication by the agency to the contrary. *See, e.g.*, FPC v. Florida Power & Light Co., 404 U.S. 453 (1972), where this Court affirmed an FPC decision (37 FPC 244 (1967)) based upon its expertise in analyzing scientific and engineering data, notwithstanding the FPC's failure to refer to that expertise. *Cf.* Gordon v. New York Stock Exchange, Inc., 422 U.S. 659 (1975), relying upon the SEC's expertise in regulating brokerage commissions in the light of its presumed familiarity with these matters.

57a), the FCC has been intimately involved in all of the matters giving rise to the instant dispute through its enunciation of the national regulatory policy bearing upon SCC and Western Union provision of FX/CCSA services; its issuance of prior orders defining the Bell System's obligation to assist these carriers in the provision of these services; its familiarity with the long course of dealing between Western Union and the Bell System, as most recently expressed in the 1970 version of their contracts; its jurisdiction over Bell System tariffs for the provision of facilities and connections involved in Western Union's and the SCC's provision of FX/CCSA services; etc. It was thus eminently qualified to pass upon the issues underlying construction of the Bell System-Western Union contracts.

That this is so is clearly revealed by Western Union's principal argument in support of its construction of the disputed contracts. Overridingly, that argument turned upon whether the parties had reference to the *status quo* of 1970 when they fixed Bell System's obligations to provide facilities to Western Union for interconnected services or whether instead they contemplated an open-ended obligation that would force the Bell System to provide facilities at contract rates to Western Union for any new (post-1970) interconnected services.

As indicated above (p. 7 n.5), there were a variety of arguments advanced by the Bell System which support the conclusion that the Bell System-Western Union 1970 contracts did not contemplate the open-ended Bell System obligation urged by Western Union. However, the FCC's rejection of Western Union's construction of one of the provisions of the 1970 agreement, Section 3(d) (Petn. 76a-77a), sufficiently demonstrates the expertise that the FCC brought to the Western Union-Bell System contract dispute.

Western Union contended that under Section 3(d) it was entitled to receive facilities for interconnected services, if, at any time after 1970, the Bell System filed tariffs with the FCC permitting such interconnection. The FCC rejected Western Union's construction of Section 3(d) as one which would render the section "superfluous," since

> "[i]f there were no Section 3(d) in the contract, then the terms and conditions governing the connection of Bell services with the services of other common carriers would be found in the then effective applicable Bell System customer tariffs." (Petn. 56a-57a).

Thus, under the FCC's view of the matter, for Section 3(d) to provide any meaningful role in defining the Bell System's obligations, the reference to "tariffs" in that section must be to those which were on file as of 1970 when the contracts were renewed, not those which might subsequently be filed by the Bell System. (Petn. 57a).

An examination of the opinions of the FCC and of the record upon which they were based clearly shows that the FCC was correct in construing Section 3(d) and other provisions of the Bell System-Western Union contracts as not extending to Western Union's lease of facilities for FX and CCSA services. But that is not really the point here.

What is determinative is that the Third Circuit both articulated and applied the applicable standard of

judicial review under the Administrative Procedure Act in declining to upset the FCC's construction of the contracts because it was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." (Petn. 12a). Given the FCC's special insight into the nature of the Western Union-Bell System dispute and its unique appreciation of the various factors bearing upon the conflicting constructions of the contracts urged by the parties, including its awareness of the obligations imposed upon the Bell System by its tariffs—the basis for the FCC's rejection of Western Union's construction of Section 3(d)—the record here clearly demonstrates the FCC's expertise in construing the contracts and supports the lower court's refusal to engage in the type of *de novo* review urged by Western Union.[9]

Thus, the essential premise underlying the *Texas Gas* and *Chenery* cases—that there was no basis in the record for assuming agency expertise—is absent here; the FCC's knowledge of the issues presented and its general expertise in this area are readily apparent. Certainly, in arguing that the record inadequately supports the deference paid by the court below to the FCC's decision, Western Union does not present a question worthy of this Court's certiorari jurisdiction, let alone one that is suitable for the summary disposition suggested in the petition.

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[9] Indeed, the close interrelationship between Bell System tariffs and the contractual issue decided by the FCC brings this case within the line of authority deferring to administrative agency expertise in interpreting and applying tariffs. *See, e.g.*, Indiana Harbor Belt Railroad Co. v. United States, 510 F.2d 644 (7th Cir.), *cert. denied*, 422 U.S. 1042 (1975).

CONCLUSION

For the reasons stated herein, Western Union's petition should be denied.

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Supreme Court, U. S.
FILED
JAN 31 1977
MICHAEL RODAK, JR., CLERK

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FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-41a) is reported at 541 F. 2d 346. The orders of the Federal Communications Commission (Pet. App. 64a-69a; 45a-63a) are reported at 49 FCC 2d 321 and 53 FCC 2d 1045.

JURISDICTION

The court of appeals entered judgment (Pet. App. 42a-43a) on July 28, 1976. A timely petition for rehearing and suggestion of rehearing *en banc* were denied on August 18, 1976 (Pet. App. 44a). The petition for a writ of certiorari was filed on November 15, 1976. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals erred in concluding that the Federal Communications Commission's construction of contracts between Western Union and the Bell System involved complex technological and regulatory considerations that made it inappropriate for the court to construe the contracts *de novo* on review of the Commission's order.

STATEMENT

American Telephone and Telegraph Company (AT&T) and the Western Union Telegraph Company historically have "exchanged" facilities pursuant to bilateral contracts, permitting each to use certain facilities of the other in providing service to the public (Pet. App. 70a-96a).[1] These contracts have been filed with the Federal Communications Commission ("the Comission") pursuant to statute. 47 U.S.C. 211(a). The agreements involved in this petition will expire on September 28, 1978 (Pet. App. 46a).

When these contracts were most recently renewed, in 1970, Western Union was not interconnected with AT&T for the provision of foreign exchange (FX) and common control switching arrangements (CCSA) services—two variations of private line communication service requiring the use of telephone company switching equipment (Pet. App. 57a).[2] Western Union also was not ob-

[1]Although the contracts call for "exchange" of facilities, Western Union almost always is the lessee and AT&T the lessor. See *Bell System Tariff Offerings*, 46 FCC 2d 413, 431, affirmed *sub nom. Bell Telephone Co. of Pennsylvania* v. *Federal Communications Commission*, 503 F. 2d 1250 (C.A. 3), certiorari denied, 422 U.S. 1026.

[2]For background on the dispute between AT&T and other private line common carriers over FX and CCSA interconnection—including a description of those services—see *Bell System Tariff Offerings*, *supra*. See also *MCI Communications Corp.* v. *AT&T*, 369 F. Supp. 1004 (E.D. Pa.), vacated, 496 F. 2d 214 (C.A. 3).

taining local distribution facilities from AT&T for domestic satellite services, because at that time Western Union had no satellite. *Western Union Authorization*, 38 FCC 2d 1197.

In 1974, the Commission required AT&T to furnish Western Union and similar carriers interconnection facilities, including FX and CCSA services, but barred AT&T from modifying or abrogating existing exchange agreements with Western Union by subsequently filing tariffs for interconnection facilities and services already covered by such agreements (Pet. App. 5a).[3]

In mid-1974, Western Union asked the Commission to require AT&T to charge contract rates rather than tariff rates for facilities Western Union needed to provide certain private line services and for local distribution of domestic satellite communications. Western Union relied upon the 1974 Commission order requiring AT&T to provide facilities that would enable competing carriers to offer FX and CCSA,[4] and upon the Commission's domestic satellite communications policy requiring AT&T to furnish local distribution facilities to all authorized satellite carriers.[5] It contended that all the essential facilities were already available under the existing contracts, and that it therefore was entitled to the contract rates rather than the higher tariff rates paid by other competing carriers (Pet. App. 47a-50a).

After obtaining the views of the parties, and on consideration of the language and history of the contracts as

[3]*Bell Telephone Co. of Pennsylvania* v. *Federal Communications Commission*, *supra*.

[4]*Bell System Tariff Offerings*, *supra*.

[5]*Domestic Communications-Satellite Facilities*, 35 FCC 2d 844, reconsideration denied, 38 FCC 2d 665; AT&T, 42 FCC 2d 654.

well as relevant Commission orders bearing on the services in question, the Commission denied Western Union's request (Pet. App. 45a).[6] As to the satellite facilities, the Commission found that Western Union and AT&T had waived whatever rights they might have had under the contracts when they accepted grants of satellite authorization subject to the express condition, that the grant was subject to subsequent domestic satellite policies. Eight months after Western Union received its satellite authorization subject to this condition, the Commission determined that tariffs rather than private contracts should govern such services (Pet. App. 67a-69a; 58a-63a; 9a-10a).

The Commission also determined that the contract rates are not applicable to FX and CCSA facilities. The Commission found that the contract terms themselves, read in the light of industry practice and technology at the time of their most recent renewal, did not contemplate facilities for interconnection of services that were not available at the time of contracting, and that a specific provision of the contracts made such subsequent service-to-service interconnections as FX and CCSA subject to tariff provisions rather than contract (Pet. App. 54a-57a). Accordingly, while the Commission found that Western Union was entitled to FX and CCSA interconnection, it directed that such facilities are to be leased to Western Union pursuant to tariffs filed with the Commission (Pet. App. 57a).[7]

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[6]To the extent that Western Union also asked the Commission to require AT&T to interconnect with the telegraph company to permit the provision of FX and CCSA, the Commission granted the request and declared that AT&T was required to provide such facilities (Pet. App. 65a, 69a).

[7]This construction was buttressed by affidavits submitted by AT&T and Western Union indicating that neither party contemplated at the time of contracting that FX and CCSA facilities were covered

The court of appeals affirmed (Pet. App. 1a-21a).[8] Applying the standard of review set forth in the relevant provisions of the Administrative Procedure Act, the court was unable to find that the Commission's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). It declined to undertake a *de novo* interpretation of the agreements as they affected FX and CCSA services, because it found, that the controversy fell within the ambit of the Commission's expertise, that the agreements involved complex and sophisticated communications technology, and that the decision implicated questions of national regulatory policy (Pet. App. 11a-12a). The court applied the same standard to the agency's ruling on satellite facilities (Pet. App. 17a-20a). The court noted that determining the scope of any waiver of contract rights by Western Union when it accepted a satellite authorization required both an interpretation of the Commission's own prior action in imposing conditions on such authorizations and a factual determination whether Western Union had knowingly and voluntarily accepted it (Pet. App. 17a-18a). The court accorded "the full deference of the statutory standard" to the Commission's resolution of these questions (Pet. App. 18a).

(Pet. App. 57a, n. 12). It is also consistent with the Commission's policy of nondiscriminatory rates for facilities furnished to competing carriers and its practice of requiring that tariffs rather than contracts govern such matters (Pet. App. 66a).

[8]Judge Garth dissented (Pet. App. 21a-41a). Chief Judge Seitz joined in the majority opinion written by Judge Aldisert, but he added in a separate statement that, "even assuming that the dissenting opinion has stated the applicable scope of review, he would still deny the petition for review" (Pet. App. 21a).

Although the court of appeals rejected the argument that *de novo* review was required, it nevertheless analyzed the Commission opinions thoroughly and found them not only to be reasonable, but also to be "otherwise * * * in accordance with law" (Pet. App. 17a, 20a).

ARGUMENT

Petitioner asserts that the court of appeals' failure to undertake *de novo* review of the Commission's decision construing the agreements between Western Union and Bell is inconsistent with this Court's decision in *Texas Gas Transmission Corp.* v. *Shell Oil Co.*, 363 U.S. 263.

That case, however, does not hold that a court of appeals, in reviewing a decision of an administrative agency, is required to review *de novo* every contract interpretation question that the agency may have resolved in arriving at its own decision. The scope of review depends on whether the agency's construction "reflects the application of its expert knowledge and judgment to a highly technical field" (*id.* at 268) or whether the construction question is "one to be determined simply by the application of ordinary rules of contract construction" (*id.* at 268-269). The Court in *Texas Gas Transmission* determined that the latter criterion applied to that case, because "the record nowhere discloses that the Commission arrived at its interpretation of the 'favored nation' clause on the basis of specialized knowledge gained from experience in the regulation of the natural gas business, or upon the basis of any trade practice concerning 'favored nation' clauses. On the contrary the opinions of the examiner and the Commission show that both treated the question as one to be determined simply by the application of ordinary rules of contract construction." *Ibid.* Thus, the opinion recognizes that *de novo* review would not be

appropriate where specialized knowledge of the industry is necessary or desirable in resolving particular contract interpretation questions. To preserve Congress' allocation of administrative and judicial responsibilities, reviewing courts should accord considerable deference to the judgment of expert agencies where the facts and issues in dispute are "not within the conventional experience of judges." *Far East Conference* v. *United States*, 342 U.S. 570, 574.

The court of appeals in the present case did not depart from the principles of *Texas Gas Transmission.* On the contrary, it carefully examined the Commission's decision and the record to determine whether the agency's specialized knowledge and regulatory responsibilities were implicated in its construction of the contract, or whether an ordinary question of contract interpretation was involved.[9] The only issue presented to this Court is whether the court of appeals correctly decided this question—*i.e.*, whether it correctly applied the legal standards of *Texas Gas Transmission* to the particular facts of this case. That question does not warrant review by this Court.

In any event, the court's characterization of the contract issue was correct. The question presented to the agency involved the construction of complex and technical contract terms that were meaningful only in the light of industry language, customs and practices.[10]

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[9]The court of appeals noted that any attempt to have this matter resolved in a district court "would probably have resulted in a reference to the FCC under the doctrine of primary jurisdiction" (Pet. App. 11a n. 7.). Cf. *MCI Communications Corp.* v. *AT&T*, 496 F. 2d 214 (C.A. 3). See also *Gunther* v. *San Diego & Arizona Eastern Ry. Co.*, 382 U.S. 257, 261.

[10]See *Bell Telephone Co. of Pennsylvania* v. *Federal Communications Commission, supra.*

The contracts concerned matters that otherwise would be governed by tariffs subject to close supervision by the agency; see Statement, *supra,* p. 4, note 7. The Commission's construction of those contracts therefore defined the extent to which the services involved were to be provided by generally applicable tariffs or by private agreement. Similarly, in the satellite aspect of the case, the issue turned "on an interpretation of the FCC's own prior action in imposing the contested waiver, and upon a factual determination whether WU knowingly and voluntarily accepted its authorization subject to the condition [that the grants were subject to subsequent satellite policies, which required the rates to be governed by tariffs rather than private agreement]" (Pet. App. 18a). Thus, in rejecting Western Union's argument that *de novo* review was required, the court of appeals had ample grounds to conclude (Pet. App. 11a-12a):

> Certainly, this controversy falls within the ambit of the FCC's expertise. These agreements involve complex, sophisticated, and rapidly-evolving communications technology. Quite properly WU took the matter to the FCC for resolution, not to a district court. Moreover, the agreements implicate questions of national regulatory policy. They concern the applicability of Commission-approved tariffs intended to provide access to all common carriers on reasonable and non-discriminatory terms. Under these circumstances, the fact that these are private agreements cannot alter the statutory deference due the Commission.

The court's affirmance of the Commission's reasonable construction of such contract terms thus was entirely consistent with *Texas Gas Transmission.*[11]

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[11]Petitioner argues that the Seventh and Tenth Circuits did not accord "special deference" to the Federal Power Commission's interpretation of contract provisions in *Pure Oil Co.* v. *Federal Power Commission,* 299 F. 2d 370 (C.A. 7); *Warren Petroleum Corp.* v. *Federal Power Commission,* 282 F. 2d 312 (C.A. 10); and *Skelly Oil Co.* v. *Federal Power Commission,* 532 F. 2d 177 (C.A. 10). However, none of those opinions purports to adopt a general rule which would require *de novo* review with respect to every contract interpretation question that any administrative agency may decide.

CONCLUSION

The petition for a writ of certiorari should be denied.

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JANUARY 1977.

Supreme Court, U. S.
FILED
FEB 7 1977
MICHAEL RODAK, JR., CLERK

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

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PETITIONER'S REPLY BRIEF

The briefs in opposition filed by the Government and by respondents, American Telephone and Telegraph Company and the Bell System Operating Companies ("AT&T"), contain erroneous assertions and arguments which call for reply.

I.

AT&T's contention that Western Union seeks "a preferred position, vis-a-vis other carriers" (AT&T Opp. at

8) is unfounded.[1] Western Union seeks enforcement of contract rights it bargained for; it has never sought preferential treatment; it has never objected to other carriers' reliance on the Bell-Western Union contracts as a yardstick in securing comparable competitive rates. Assuming that the FCC's strained construction of the contracts was aimed at maintaining rate parity between Western Union and its competitors, neither the FCC, nor AT&T has ever explained why that goal cannot readily be achieved by requiring AT&T (a) to adhere to the contracts and (b) to extend the lower contract rates to Western Union's competitors during the contracts' life.

It is indeed true that competitive considerations are lurking here, but the question is not one of preferential treatment for Western Union vis-a-vis other carriers, as AT&T states. They derive, rather, from AT&T's attempt to impose on new common carrier competitors sharply higher rates than it was then charging Western Union for similar circuitry.

The Bell-Western Union contract rates were negotiated at arm's length in 1970 as a long-term commercial arrangement presumably satisfactory to both parties. At that time, AT&T could not foresee that the FCC would later adopt a policy of stimulating new competitive entry into private line communications. AT&T's attempt some three years later in 1973 to impose a new rate structure —ranging from 55 to 222 percent, and averaging 131 percent, above the contract rates[2]—reflected its growing awareness that the FCC would soon require it to furnish communications facilities to its small new rivals. It sought at first to abrogate,[3] and later to undermine, the

[1] The Solicitor General has not made this argument.

[2] *See* Bell Sys. Tariff Offerings, 46 F.C.C.2d 413, 434, *aff'd*, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975).

[3] *Id.* at 430-31.

one available yardstick—the Bell-Western Union contracts—which the FCC might have applied to determine the charges to AT&T's new competitors. As AT&T was undoubtedly aware, the Commission might well find that the Bell-Western Union contract rates reflected a fair level of charges to all carriers, at least for the life of the contracts, because AT&T had voluntarily agreed to them at a time when its pricing judgment was unclouded by the intense animus it later developed towards its new competitors.

In short, regardless of the strictly legal questions involved in this litigation, there can be no doubt that (1) AT&T is opposed to the lower charges which the Bell-Western Union contracts provide, and (2) Western Union is not opposed to all carriers being permitted to lease facilities from AT&T at comparable, non-discriminatory charges.

II.

To avoid the controlling force of *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943), and *Texas Gas Transmission Corp.* v. *Shell Oil Co.*, 363 U.S. 263 (1960), which the court below completely disregarded, AT&T argues that the agency decision was indeed the product of FCC expertise, although it concedes that "the FCC did not explicitly refer to or discuss the expertise which it could bring to the resolution of the Western Union-Bell System contract dispute." AT&T Opp. at 11 n.8. Reliance on expertise, however, is not a matter for *post hoc* speculation by counsel defending agency action; it must be determined by examining the agency's Memorandum Opinion and Order.

While recognizing that *Texas Gas Transmission* precludes a reviewing court from deferring to an agency's construction of a contract where the agency "treated the

question as one to be determined simply by the application of ordinary rules of contract construction" (363 U.S. at 268-69), the Government's brief in opposition asserts that the Court of Appeals correctly found that "the agency's specialized knowledge and regulatory responsibilities were implicated in its construction of the contract" (FCC Opp. at 7).

The Commission's opinion on its face clearly manifests the contrary. Therein the FCC explicitly states that its decision was based on "the language of the contracts." Pet. App. 54a. The facts were not in dispute, no evidentiary hearing was held or required, and no policy factors were articulated in the decision. In short, none of the traditional elements of agency "expertise" warranting judicial deference was present.[4] Pet. App. 54a-57a.

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[4] The cases relied upon by AT&T (AT&T Opp. at 9 n.6) are inapposite. They concern the resolution of factual disputes or the unequivocal exercise of agencies' expertise in making interpretations intimately concerned with their respective regulatory mandates. *See* United Gas Pipe Line Co. v. Memphis Light, Gas and Water Div., 358 U.S. 103, 114-15 & n.8 (1958) (deference due FPC determination whether contract falls within scope of an agency regulation); Gunther v. San Diego & A. E. Ry., 382 U.S. 257, 260-62 (1965) (deference due Railroad Adjustment Board as expert body in settling grievances growing out of the interpretation of collective bargaining agreements); NLRB v. Marcus Trucking Co., 286 F.2d 583 (2d Cir. 1961) (deference accorded NLRB finding that evidence manifests the *fact* that a contract had been agreed to); North Atl. Westbound Freight Ass'n v. FMC, 397 F.2d 683, 685 (D.C. Cir. 1968) (deference may be due FMC interpretation of shipping conference agreements when fact or policy issues are involved); St. Petersburg Bank & Trust Co. v. Boutin, 445 F.2d 1028, 1033 (5th Cir. 1971) (deference due SBA's construction of its own procedural requirement designed to carry out its statutory mandate).

AT&T also relies on Far East Conference v. United States, 342 U.S. 570 (1952), and Mississippi Power & Light Co. v. United Gas Pipe Line Co., 532 F.2d 412 (5th Cir. 1976). AT&T Opp. at 9-10 n.7. These cases, dealing with agency primary jurisdiction and not with judicial scope of review, are irrelevant. AT&T's argument

The only issue before the FCC and the only issue it addressed was the scope of the parties' contractual obligations.[5] The dispute was before the Commission not because of any complex technical questions or other factors requiring agency expertise, but solely because AT&T was attempting to apply to Western Union the Bell System tariffs that the FCC had already declared in an earlier proceeding to be a nullity insofar as the contracts and tariffs overlapped. *Bell System Tariff Offerings*, 46 F.C.C.2d 413, 434, *aff'd*, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975). The issue before the FCC thus was merely the scope of the bargain—an issue the FCC itself recognized was controlled by settled principles of contract law (Pet. App. 56a)—and in that sense the question was identical to the one confronting the Federal Power Commission in *Texas Gas Transmission Corp.* v. *Shell Oil Co., supra.* While the FPC is surely as expert about natural gas transactions as the FCC is about communications carrier facilities arrangements, neither case involved anything more than ordinary contract construction.[6]

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obliterates the difference between agency jurisdiction and expertise entitled to deference by a reviewing court, treating them instead as coextensive. As shown in the petition for certiorari (Pet. 11-12), this error lies at the heart of the ruling below, and cannot be reconciled with *Texas Gas* and *Chenery*.

[5] In the second portion of the FCC's decision relating to the applicability of the contracts to domestic satellite operations, the Commission found it unnecessary to construe the contracts, and instead relied on the theory that Western Union had waived whatever rights it had. Pet. App. 58a-63a.

[6] The argument that agency expertise was implicitly involved in the contract adjudication, if at all applicable, is far more compelling in the case of the FPC's construction of the *Texas Gas* contract than the FCC's action below. Unlike the Bell-Western Union facilities contracts which are not subject to the FCC's ratemaking procedures (Pet. 4 & n.6), the natural gas contract involved in *Texas Gas* had previously been filed with the FPC as a rate schedule and had been subject to agency review under the Natural Gas Act. *See* Texas Gas Transmission Corp. v. Shell Oil Co., 363 U.S. 263,

Judge Garth's dissenting opinion below—the only judicial opinion to address the merits of the contract dispute—underscores the conventional common law character of the litigation. He was aware that no factual dispute existed (Pet. App. 33a) and that the FCC had found that there was no technical obstacle to using contract facilities for the switched services Western Union wished to provide. Pet. App. 35a, *quoting* Pet. App. 54a. The only issue was whether the contracting parties intended to freeze the types of services for which contract facilities could be used to those offered at the time the contracts were executed in 1970 or whether the parties drafted an agreement applicable to service offerings thereafter approved by the FCC as common carrier services. Pet. App. 36a, 56a. This type of question—do contracts apply under new conditions?—does not turn on technical expertise; the standards to be applied in resolving the question are those applied daily by judges in construing often complex commercial agreements.

Thus, Judge Garth's conclusion that the FCC had given the contracts a "tortured" construction in the mistaken belief that a literal construction would render the controlling provision superfluous (Pet. App. 35a-36a) was the product of ordinary contract analysis, well within "the conventional competence of the courts. . . ." *Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290, 305 (1976). Like the FCC, he regarded this case as an ordinary contracts case. Indeed, not until the case reached this Court have respondents argued that it involved anything more. By treating the FCC action as something more, however, the majority below misconceived the nature of the

265 (1960). Since neither agency explicitly referred to its own expertise but simply referred to the law of contracts, the holding in *Texas Gas* that nothing more than principles of contract law was involved applies *a fortiori* to this case.

agency's decision and applied an improper standard of judicial review. In doing so, the Court of Appeals erroneously disregarded the patently applicable and controlling holding of this Court in *Texas Gas*.

CONCLUSION

The petition for certiorari should be granted and the judgment below reversed.

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February 7, 1977